**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| High-Cost Universal Service Support | ) | WC Docket No. 05-337 |
| | ) | |
| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| | ) | |

# REPLY COMMENTS OF RURAL CELLULAR ASSOCATION AND THE ALLIANCE OF RURAL CMRS CARRIERS

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## SUMMARY

The recommendation of the Federal-State Joint Board on Universal Service ("Joint Board") for a cap on high-cost disbursements made to Competitive Eligible Telecommunications Carriers ("CETCs") is deeply flawed. The unnecessary and unwarranted proposal, which the Joint Board failed to support with any credible data or evidence, would attempt to "solve" an unproven problem, would be harmful to consumers in rural America, would unfairly discriminate against CETCs, and would undercut the Commission's critical task of adopting long-term universal service reform.

Rural Cellular Association ("RCA") and the Alliance of Rural CMRS Carriers ("ARC") demonstrated these deficiencies in the Joint Board's *Recommended Decision* in their Comments, and now the record before the Commission bears out the fact that imposition of the Joint Board's CETC cap would be a mistake with painful consequences for consumers and competition.

The magnitude of the shortcomings in the Joint Board's proposal is revealed by the fact that some proponents of the CETC cap encourage the Commission to invoke what they characterize as the agency's "wide latitude" to take interim action in the case. Their apparent objective is to enable the Commission to skirt issues relating to the failure of the proposed cap to comply with statutory requirements, judicial precedent, and the Commission's own rules and policies. The precedent relied on by these commenters, however, is inapposite because the cases they cite actually demonstrate that any attempt by the Commission to exercise broad discretion must be based on a showing that immediate action is necessary to avoid harm to consumers or segments of the telecommunications industry, and that the action taken represents a reasonable solution to the perceived problem. No such showings can be made in this case.

There is strong support in the record for the conclusion that the proposed CETC cap is unwarranted because the Joint Board has failed to prove its case. Commenters point out that the recent two percentage point increase in the contribution factor has very little to do with rising high-cost disbursements to CETCs, that the Joint Board's projections for CETC funding growth in 2007, 2008, and 2009 are not explained or supported, and that the Joint Board's reliance on recent growth in CETC disbursements as a justification for its cap is misplaced because this growth is an anticipated and reasonable consequence of recent competitive entry by CETCs in rural and high-cost markets. These commenters join RCA and ARC in arguing that, because the Joint Board's supposed justification for the cap lacks any supporting data or credibility, there is no basis for the Commission to adopt the Joint Board's recommendation.

Moreover, supporters of the CETC cap fail to refute the showing made by RCA and ARC in their Comments that continued growth in the high-cost fund (even based on the Joint Board's unsupported projections) would not result in a significant increase in the Universal Service Fund monthly surcharge and would likely be offset by continuously declining prices for wireless and other telecommunications services.

The record is replete with evidence that the cap would be detrimental to rural America. Literally thousands of consumers have urged the Commission to reject the proposed cap because they are concerned the cap will deprive them of access to valuable wireless services. First responders explain that wireless communications services are an important public safety resource, and request the Commission to reject the proposed cap because it would slow deployment of wireless services. State commissions and other commenters demonstrate that the cap, by reducing funding to CETCs, would deter competition in rural markets and hamper investment in wireless infrastructure. Other commenters express puzzlement over the Joint Board's intent to clamp

down on high-cost funding to wireless CETCs in the face of growing evidence that consumers in rural America are demanding more extensive access to wireless services.

Many commenters agree with RCA and ARC that the CETC cap would violate the Commission's core principle of competitive neutrality and that the Joint Board has failed to back up its claim that there is no such violation. Several commenters demonstrate that the Joint Board's reliance on "fundamental differences" in the regulation of CETCs and incumbent local exchange carriers (such as ILEC rate regulation and carrier of last resort obligations) as a justification for the CETC cap is irrelevant and unpersuasive. A number of commenters also show that the Joint Board has failed to demonstrate that the proposed cap complies with the universal service principles enacted by Congress in the Telecommunications Act of 1996, or with judicial decisions articulating the twin statutory objectives of preserving and advancing universal service while also promoting competition in local exchange markets.

Finally, a wide range of commenters express concern that imposition of a CETC cap would likely increase the difficulties in arriving at a consensus for long-term universal service reform, and would complicate and impair the efforts of the Commission to develop and implement corrective measures addressing problems with the current universal service mechanisms.

A picture emerges from the record. The Joint Board, with misplaced concerns about high-cost fund growth and with an ill-conceived desire to take quick action, fashioned a proposal that does not stand up to reasonable scrutiny. The Joint Board overstated risks to the sustainability of the fund, and then summoned up a discriminatory "solution" that it attempted to support with irrelevant data and unexplained projections, while at the same time ignoring the harmful effects of its CETC cap on consumers and competition in rural America. Now that these defi-

ciencies have been further exposed in the record, RCA and ARC again urge the Commission to reject the Joint Board's proposed cap.

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**REPLY COMMENTS OF RURAL CELLULAR ASSOCATION AND THE ALLIANCE OF RURAL CMRS CARRIERS**

Rural Cellular Association ("RCA"),[1] and the Alliance of Rural CMRS Carriers ("ARC")[2] by counsel and pursuant to the Commission's *Notice of Proposed Rulemaking*, FCC 07-88 (released May 14, 2007) ("*NPRM*") hereby provide reply comments on the *Recommended Decision* of the Federal-State Joint Board on Universal Service ("Joint Board"), FCC 07J-1 (released May 1, 2007) ("*Recommended Decision*"), proposing an "interim, emergency cap" on high-cost support to Competitive Eligible Telecommunications Carriers ("CETCs").[3]

[1] RCA is an association representing the interests of approximately 100 small and rural wireless licensees providing commercial services to subscribers throughout the nation. RCA's wireless carriers operate in rural markets and in a few small metropolitan areas. No member has as many as 1 million customers, and all but two of RCA's members serve fewer than 500,000 customers.

[2] ARC is a group of CMRS carriers who are licensed to serve rural areas in Colorado, Nebraska, Guam, Wisconsin, Alabama, Mississippi, West Virginia and South Carolina. ARC's membership is comprised of the following carriers (or their subsidiaries): Cellular South Licenses, Inc., Guam Cellular and Paging, Inc., N.E. Colorado Cellular, Inc., Easterbrooke Cellular Corp., Airadigm PCS, Hargray Wireless and the Cellcom Companies.

[3] *Recommended Decision* at para. 1. These reply comments are filed within the deadline for filing adopted by the Wireline Competition Bureau. *See High-Cost Universal Support Service, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, *Order*, DA 07-2565 (Wireline Competition Bureau, rel. June 12, 2007) (modifying the pleading cycle established in the above-captioned proceeding by designating June 21, 2007, as the deadline for reply comments).

## I. INTRODUCTION

The record now before the Commission makes two facts very clear. The first is that the Joint Board's assertions about the nature of the "emergency" currently confronting the high-cost fund, and its conclusions about how to "fix" it, are not based on the clear and indisputable evidence one would expect, given how much is at stake for consumers in rural America. This is what the record shows:

*First*, consumers in rural America recognize and want to take advantage of the benefits of mobile wireless services, both in times of emergency and in their everyday lives. They are aware that falling wireless prices mean that access to wireless has important pocketbook benefits, and they are increasingly insistent that they be provided with access to wireless in a manner comparable to consumers in urban areas.

*Second*, the CETC cap proposed by the Joint Board would frustrate these consumer expectations for wireless services. CETCs would find it more difficult to meet existing infrastructure deployment obligations, and plans for market entry and investment in facilities in rural America would be upset by imposition of the cap. These developments would have obvious and adverse consequences for consumers.

*Third*, the CETC cap would undermine the Congressional mandate to promote competition in rural America by overtly discriminating in favor of ILECs, to the detriment of CETCs and their customers. Given that the proposed cap would reduce the level of high-cost funds disbursed to CETCs while making no changes to ILEC funding, the cap would dispense an obvious competitive advantage to ILECs. Proponents of the cap offer no path to a conclusion that the cap somehow would not violate competitive neutrality, nor do they repair damage to the Joint Board's credibility as a result of its failure to make a plausible case for the cap.

The core of the Joint Board's case is the two percentage point jump in the contribution factor between the First and Second Quarters of 2007, and the Joint Board's projections of growth in CETC high-cost fund support from this year through 2009. Since the release of the *Recommended Decision*, the contribution factor has trended downward again, a problematic development for those who claim "unsustainability" is just around the corner.[4] Supporters of the cap fail to shed any light on how the Joint Board calculated its projections of growth in CETC support or put any evidence in the record that could assuage the real concern that the cap will deal a blow to consumer welfare. (One proponent of the cap, in fact, concedes that the cap would undoubtedly burden CETCs, thus disadvantaging consumers in rural America.)

RCA and ARC examine these and other issues in detail in the following sections. We will demonstrate that the record before the Commission presents many formidable hurdles in the path of any decision to impose a CETC cap. There is substantial support in the comments for arguments that:

- The Joint Board has failed to make a case that there is an emergency posing an immediate threat to the viability of the high-cost fund.
- No explanation has been presented by the Joint Board in support of its apparent view that the high-cost fund cannot be sustained between now and the completion of work on universal service reform by the end of next year.
- The recent two percentage point increase in the contribution factor, upon which the Joint Board relies as support for its recommended CETC cap, has very little to do with increased levels of overall high-cost support and even less to do with increased levels of CETC support.
- Any basis for the Joint Board's projections of CETC support growth this year, and in the following two years, is completely unexplained and unsupported.
- Casting any action imposing the cap as "interim" would not free the Commission from squaring its action with statutory requirements and its own precedent.

[4] FCC Public Notice, CC Docket No. 96-45, *Proposed Third Quarter 2007 Universal Service Contribution Factor*, DA 07-2639 (rel. June 14, 2007)(announcing a decrease in the USF contribution factor from 11.7% to 11.3%).

- Imposition of a CETC cap would suppress competitive entry by CETCs in rural and high-cost markets, and would drive down investment in the expansion of wireless infrastructure and services in these markets.

- The opportunity of consumers in rural America to access the unique public safety and other benefits of wireless service would be diminished by imposition of the proposed cap.

We begin in Section II with a discussion concerning the failure of commenters supporting the proposed CETC cap to provide any factual basis upon which the Commission could conclude that the high-cost fund is in crisis. In Section III, we refute suggestions by some commenters that the circumstances of this case present the Commission with an opportunity to exercise expansive discretionary powers to impose a cap. In Section IV, we discuss the evidence presented in the record demonstrating that imposition of a CETC cap would impair CETC entry, expansion, investment, and competition in rural America, and that the cap would have detrimental consequences for consumer welfare. Finally, in Section V, we trace the evidence and arguments in the record demonstrating that the proposed cap violates competitive neutrality, and that the rationales advanced by the Joint Board and its supporters to avoid this result are unavailing.

## II. THERE IS NO BASIS FOR THE COMMISSION TO CONCLUDE THAT AN "EMERGENCY" COMPELS IMPOSITION OF A CAP ON CETC DISBURSEMENTS

RCA and ARC demonstrated in their Comments that the Joint Board has failed to present any evidence that emergency imposition of a cap on CETC high-cost fund disbursements is necessary to stave off significant harm to consumer welfare, and that, to the contrary, compelling statistical and other evidence illustrates that any increases in consumer costs as a result of high-cost fund growth are likely to be marginal and more than offset by the continuing downward trend in rates for most telecommunications services.[5] In Section II.A., *infra*, we show that, al-

[5] RCA and ARC Comments at 12-16.

though some proponents of the CETC cap make broad assertions that the cap is necessary to avert increased consumer costs, these parties do not present any information about the level of these costs, nor do they explain why they believe this purported impact on consumers would be so severe as to warrant the emergency imposition of a cap.

RCA and ARC further explained in their Comments that the Joint Board's rationale for its proposed cap is significantly undermined by lack of any explanation as to how the Joint Board derived its projections for growth in CETC funding, and by the Joint Board's failure to acknowledge that the recent increase in the contribution factor was largely caused by factors having very little to do with growth in CETC funding.[6] In Section II.B., *infra*, we discuss the fact that other parties agree with the assessment made by RCA and ARC, and that those parties who embrace the Joint Board's numbers and projections have failed to look behind them.

RCA and ARC demonstrated in their Comments that the Joint Board has failed even to explain what would constitute "unsustainability" of the fund, and also has not addressed the question of why and how the fund would become "unsustainable" before the Joint Board's promised due date for comprehensive universal service reform.[7] We return to this point in Section II.C., *infra*, and also discuss the fact that a number of parties share our concern that imposition of a cap would risk further delay in the Commission's long journey toward adopting universal service reform.

Finally, in Section II.D., *infra*, we re-emphasize our view—which is shared by other commenters—that the Commission, instead of "solving" the imagined "crisis" faced by the high-cost fund, should devote itself to resolving all the issues on the table that must be addressed in

[6] *Id*. at 5-8.

[7] *Id*. at 7-8.

order to accomplish the task of preserving and advancing universal service, and promoting competition, in rural America.

### A. Consumer Welfare Will Not Be Adversely Affected in the Absence of a Cap.

An astounding and disappointing aspect of the Joint Board's proposal to impose a CETC cap is the fact that the Joint Board has spent very little time evaluating the problem it perceived, or assessing its proposed solution, from the perspective of consumers.[8] Had it done so, we are convinced it would have come to the realization that, even if its projections regarding fund growth are accurate (which is very unlikely), the impact on consumers would be minuscule, and that imposition of the cap would likely have significant adverse effects on consumers in rural and high-cost areas.[9]

Not surprisingly, while principal support for the cap comes from those who would directly benefit from it, we are not aware of a single consumer having come forward to advocate for the cap.[10] In fact, as of this date, over 3,200 consumers have filed informal comments in the docket specifically opposing the cap. Whereas a large number of consumer groups have participated in previous comment cycles on universal service issues that truly affect ratepayers' pocketbooks, those groups are conspicuously absent here.[11] Moreover, parties favoring the cap be-

[8] Remarkably, the *Recommended Decision* does not mention the word "consumer" even once.

[9] We discuss these adverse effects in Section IV.B., *infra*.

[10] There is considerable consumer opposition to the proposed cap, which we discuss in Section IV.B., *infra*. We acknowledge that NASUCA has expressed support for the cap, even though it concludes that the emergency perceived by the Joint Board has been caused in part "by the failure of the Commission and of the joint Board to act in a coordinated fashion on many of the issues that have previously been put out for comment." NASUCA Comments at 2 (footnote omitted). (A chart of commenter names and short-form citations is included in Appendix A.) For reasons we discuss, we believe that NASUCA's position is short-sighted at best.

[11] For example, on April 18, 2003, the following groups submitted comments, individually or jointly, expressing concerns regarding excessive universal service surcharges in the event of a transition to a numbers- or connections-based USF contribution methodology: the League of United Latin-American Citizens, Telecommunications Research & Action Center, Community Action Partnership, American Association of People with Disabilities, Consumer Action, Rainbow-Push Coalition, the National Indian Education Association, NAACP, Consumers Union, Texas Office of Public Util. Counsel, Consumer Federation of America, Appalachian People's Action Coalition,

cause it would allegedly prevent increases in consumers' telephone bills, fail to discuss the extent of these increases or to demonstrate that such increases would constitute a level of harm severe enough to warrant imposition of the cap. CenturyTel, for example, asserts that the cap would lessen the burden consumers would face from an increasing contribution factor, but it sheds no light on the extent of this burden.[12] CenturyTel also contends that failure to address "escalating CETC support" would only "prolong high costs consumers are paying for communications services" without documenting these allegedly high costs or establishing any link between them and the supposed escalation in CETC support.[13] Nor does CenturyTel acknowledge the significant savings that rural consumers achieve when new high-quality wireless service is introduced.

NASUCA's arguments do not fare any better, since the consumer advocate group contents itself with reciting the Joint Board's projections of CETC support growth, making its own dubious projection about an increase in the contribution factor, speculating about state action regarding pending CETC designations, and then concluding that "[c]onsumers cannot be asked to bear this burden."[14] NASUCA makes no attempt to quantify the burden or explain why the supposed burden necessitates emergency imposition of a CETC cap.[15] USTA takes a similar ap-

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Center for Digital Democracy, Edgemont Neighborhood Coalition, and Migrant Legal Action Program. None of these groups filed initial comments in support of the proposed CETC cap.

[12] CenturyTel Comments at 8. (A chart of commenter names and short-form citations is included in Appendix A.) For reasons we discuss in Section II.B., *infra*, it is far from clear whether there will be any appreciable increases in the contribution factor.

[13] *Id.*

[14] NASUCA Comments at 4-5. Critically, NASUCA makes the unwarranted assumption that all variables will remain constant, when the increase in the contribution factor by two percentage points between first and second quarters of 2007 resulted primarily from an absence of true-ups that, in previous quarters, had nearly always subtracted significantly from funding requirements.

[15] We are at a loss to understand how the nation's advocates for *consumers* can fail to advocate for any policy that is significantly improving rural consumers' access to critical 911 and E-911 services.

proach, expressing concern about "the burden consumers face from an increasing contribution factor"[16] and asserting that failure to impose a cap will raise the cost of communications services.[17] Again, there is no attempt to document these claims or quantify the predicted burden on consumers.

Verizon attempts to link "escalating universal service surcharges on consumers' bills"[18] to the increase in CETC support, and claims that the contribution factor "likely will continue to increase absent Commission action."[19] Verizon does not support its views with any analysis. Indeed, had Verizon conducted a meaningful analysis of the causes of the increases in the contribution factor, it would have seen the very real possibility that the factor would soon go down again—which in fact it has.

In contrast, RCA and ARC undertook an extensive analysis of consumer impacts in their Comments, demonstrating that, *even if* the Joint Board's unsupported and highly suspect projections about the level of CETC support in 2008 are accepted, a wireless consumer with a $50.00 monthly bill would experience a federal Universal Service Fund ("USF") surcharge increase of just 31 cents.[20] Thus, the Joint Board and its supporters are pinning their "emergency" on 31 cents a month.

The question this leaves for the Commission is simple: Does a CETC cap make sense if consumers are not likely to be disadvantaged in any appreciable way between now and the Commission's implementation of comprehensive universal service reform (which, the Joint

[16] USTA Comments at 6.

[17] *Id*. at 7.

[18] Verizon Comments at 4.

[19] *Id*. at 5.

[20] RCA and ARC Comments at 13. RCA and ARC go on to provide further data supporting their view that consumer welfare would not be adversely affected if the Commission rejects imposition of a CETC cap. *Id*. at 13-15.

Board assures us, will occur in 18 months' time)? In answering this question, and in making its public policy decisions in this proceeding, the Commission also should balance an unsupported worst-case 31 cents a month against the risks posed by the cap to the welfare of consumers in rural America,[21] and against the fact that imposition of the cap cannot be squared with the Commission's principle of competitive neutrality or with universal service principles codified by Congress.[22]

Before turning to a discussion of the Joint Board's projections of CETC growth, we note that Verizon advances an additional argument regarding the risk to consumer welfare if a cap is not imposed. Specifically, Verizon contends that "[l]arger and larger USF surcharges adversely affect the affordability of telecommunications services[,]"[23] citing a recent study undertaken by the Heartland Institute.[24] Verizon asserts that "[u]niversal service surcharges are a major component of the taxes and fees on voice services . . . ."[25] The Heartland Study assumes an average wireless monthly bill of $49.98, and an average tax and fee rate of 11.78%, giving an average tax and fee paid of $5.89 per month.[26] RCA and ARC have calculated that a wireless customer with a $50.00 monthly bill pays a federal USF surcharge of about $2.17, or 36.8% of the total taxes and fees presented in the Heartland Study. Based on the share of CETC high-cost support as a percentage of the overall USF, only 14.7% of the $2.17 surcharge, or 32 cents, is attributable to CETC high-cost support.[27] Although the Heartland Study lists national USF charges as one of

[21] *See* Section IV.B., *infra*.

[22] *See* Section V., *infra*.

[23] Verizon Comments at 5.

[24] David Tuerck, Paul Bachman, Steven Titch & John Rutledge, *Taxes and Fees on Communication Services*, Heartland Policy Study #113 (May 2007) ("Heartland Study" or "Study").

[25] Verizon Comments at 5.

[26] Heartland Study at 1 (Fig. 1).

[27] RCA and ARC Comments at 13.

the "main taxes and fees"[28] applicable to wireless service, the authors of the Heartland Study do not focus attention on the USF charge, instead commenting that "[w]ireless voice service has been the target of specific discriminatory city and state excise taxes across the country."[29]

While the Heartland Study concludes that taxes and fees are burdensome to consumers,[30] it is important to keep in mind that *low-income consumers are shielded from any burdens associated with the federal USF surcharge because they are exempt from paying it*.[31] This fact alone presents serious problems for those arguing USF contributions threaten to make telephone service unaffordable. Because CETC high-cost support accounts for only a small increment of the federal surcharge, capping this support would have only a marginal effect in addressing the concerns raised by the Heartland Study. In fact, the solution advocated by the Heartland Study is to "reform the Federal Universal Service Fund to reduce its cost."[32]

Moreover, the Heartland Study does not take any account of the fact that, as RCA and ARC discuss in Section IV.B., *infra*, the cost of wireless service has dropped to 7 cents per minute in 2005 (the most recent year for which data is available), and average monthly wireless bills have dropped by 18.7 percent during the 12-year period ending in 2005. Meanwhile, monthly wireline local telephone bills have remained about the same, and some wireline customers have also had to face large intrastate long distance bills, because the boundaries of local calling areas designated by the wireline carriers often do not include a significant number of residential or business lines.

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[28] Heartland Study at 11.

[29] *Id*.

[30] *Id*. at 21.

[31] *See* RCA and ARC Comments at 13.

[32] Heartland Study at 3.

### B. The Joint Board's Unsupported Projections of Fund Growth Do Not Justify a Cap.

The Joint Board, after miscalculating consumer welfare in its analysis, compounded skepticism about the credibility of its recommendation by resting its proposed cap on a foundation of unexplained and unsupported projections of CETC support and a "somewhat misleading portrayal"[33] of the 11.7% contribution factor. Supporters of the cap have simply chosen to accept the Joint Board's projections about CETC support in 2007, 2008, and 2009 without addressing the fact that the *Recommended Decision* is devoid of any data supporting these projections. None of these commenters attempts to validate, confirm, or explain the Joint Board's projections. Those who agree with the Joint Board's observation that the 11.7% contribution factor is "the highest level since its inception"[34] ignore the fact that the recent increase in the contribution factor has very little to do with CETC high-cost support.[35]

Other commenters, however, share the concerns expressed by RCA and ARC about the Joint Board's projections. Alltel observes that "it is impossible for parties to this proceeding to verify or comment on" the data and projections upon which the Joint Board relies, and points out that the Commission is obliged to seek public comment on the underlying data.[36] Alltel also joins RCA and ARC in arguing that the recent increase in the contribution factor is not an

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[33] Alltel Comments at 6.

[34] *Recommended Decision* at para. 4 n.11.

[35] *See, e.g.*, Frontier Comments at 2; ITTA Comments at 4 (citing projected increase from 2006 to 2009); MIC Comments at 2; NASUCA Comments at 4; NECA Comments at 2, 4; Nebraska PSC Comments at 3 (citing the Joint Board estimate for 2008); TSTC Comments at 2 (citing the Joint Board estimate for 2007 and 2009); USTA Comments at 1 n.3, 2; Verizon Comments at 4-5; WTA Comments at 2; Windstream Comments at 2 n.6. Embarq references high-cost support projections it submitted to the Commission in February 2007, and contends that its analysis confirms the Joint Board's projections. Embarq Comments at 4 (citing Letter from Jeffrey S. Lanning, Embarq, to Marlene H. Dortch, FCC, CC Docket No. 96-45, Feb. 15, 2007 ("Lanning Letter")). But Embarq's "admittedly simplistic" projections (Lanning Letter at 1) only address the potential impact on the high-cost fund if the Commission were to grant all pending ETC designation petitions. Embarq's unsupported estimate of a $150 million increase in overall federal high-cost support is substantially less than the Joint Board's equally unsupported estimate of $280 million for 2007.

[36] Alltel Comments at 5.

"emergency" or "crisis" driven by growth in CETC funding, since Chairman Martin, in a response to a recent congressional inquiry, has explained that growth in high-cost funding "is a relatively minor factor in the most recent increase in the contribution factor."[37]

The fact that the increase in the contribution factor from 9.7% to 11.7% for the most part does not involve increases in high-cost funding, coupled with the fact that there is no basis in the record for the Joint Board's projections of CETC funding growth in 2008 and 2009, make highly questionable any assertion that the contribution factor will continue to increase, or that any such increase will be caused principally by growth in CETC funding. Indeed, the decline in the contribution factor for Third Quarter 2007 occurred notwithstanding continued increases in high-cost support overall and without any adjustments which have periodically reduced the contribution factor.[38]

Further, the Montana PSC points out that the Joint Board's claim that high-cost funding has increased rapidly in recent years is ambiguous, because the percentage of growth in CETC support has decreased drastically from about 1000% from 2000 to 2001 to about 28% from 2005 to 2006. Thus, according to the Montana PSC, "for the Joint Board to now predict a 90% plus annual percent growth rate for 2006 to 2007 is suspect."[39]

Again, the question this leaves for the Commission is simple: Does it make sense to impose a cap based on projections of CETC funding growth that are unsupported, and without any

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[37] *Id*. at 6.

[38] At this time, there is no publicly available data to determine whether the absence of adjustments in recent periods is a policy choice being driven by the perceived need for a cap or by other factors.

[39] Montana PSC Comments at 4. *See also* Midcontinent Comments at 4 (arguing that growth in fund disbursements to CETCs was expected because, although ILECs receive support at the same level regardless of the number of lines they serve, CETCs receive funding only for lines they actually serve; as these CETC lines increase, disbursements to CETCs must rise); Mid-Rivers Comments at 5 (stating that, as the designation of wireless CETCs in the past several years has led to increased high-cost support, it is important to keep in mind that "any growth expressed from a zero or small number baseline is usually a very large number" and "[a]ny statistical measure must be viewed in the proper context").

opportunity for public comment on the methodologies, assumptions, and calculations underlying the projections?[40] The record of this proceeding unavoidably leads to the conclusion, as expressed by RCA and ARC in their Comments,[41] that the Joint Board has failed to support its assertions about the level of growth in the high-cost fund between now and 2009.

### C. There Is No Evidence That the High-Cost Fund Will Become Unsustainable During the Period Before the Commission Completes Its Work on Long-Term Universal Service Reform.

As we discuss below,[42] there is considerable support for the position taken by RCA and ARC that the main focus of the Joint Board and the Commission should be completing their work on comprehensive universal service reform, instead of rushing to judgment on the imposition of a CETC cap. RCA and ARC demonstrated in their Comments that, given the 18-month timetable promised by the Joint Board for completion of this work, it is incumbent on the Joint Board to explain its apparent conclusion that the high-cost fund cannot survive this 18-month period.[43]

The Joint Board did not undertake such an explanation, and neither have those commenters who support the proposed cap. No one has sought to provide any detailed discussion of the process whereby the fund will become unsustainable, or what will comprise this unsustainability, or why this state of unsustainability will be reached before universal service reform is in place next year.

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[40] Courts have recognized the problems posed by agency actions that are not sufficiently explained or justified. "[J]udicial review can occur only when agencies explain their decisions with precision, for '[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action . . . .'" *American Lung Ass'n v. EPA*, 134 F.3d 388, 992 (D.C. Cir. 1998) (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 196-97 (1947)).

[41] RCA and ARC Comments at 5-8.

[42] See Section II.D., *infra*.

[43] RCA and ARC Comments at 7-8.

Centennial criticizes the claim that an emergency exists that requires precipitous action, effectively placing the current situation in context by comparing it to the real emergencies faced by the telecommunications industry and regulators in the wake of hurricanes Katrina and Rita, the terrorist attack on the World Trade Center, and the extensive telephone service outage in 1991 caused by software problems in an SS7 system.[44] Centennial concludes:

> By contrast, when it appears that the universal service fund assessment percentage next year may be some tenths of a percentage point higher than it is this year, that is a reason for concern. It is even a reason for taking careful action—even prompt action—after due consideration. It is not, however, an "emergency"—not by any stretch of the imagination.[45]

Moreover, claims of an "emergency" ring false when one considers that the growth in the fund to date is an entirely predictable outcome of Congress and the Commission making high-cost support explicit and available to competitors. Dobson explains that "growth [in CETC funding] is not the result of improper uses of support, but rather of factors that were entirely foreseeable and reasonable. Wireless carriers only relatively recently gained access to universal service funding eligibility; thus, their receipt of support is a relatively recent phenomenon."[46]

Finally, it is difficult to countenance the Joint Board's claim that the USF is in "dire jeopardy" of becoming unsustainable given the Commission's recent decision to use $650 million in unused funds available to increase funding for the schools and libraries mechanism for the next full funding year.[47] We have no problem with increasing funds for that worthy program; however, the Commission cannot argue that a $200 million increase in high-cost support to wireless CETCs will make the fund "unsustainable," while at the same time increasing funding to the

[44] Centennial Comments at 1-2.

[45] *Id*. at 2.

[46] Dobson Comments at 9.

[47] According to the Commission, $650 million in unused funds has accumulated in the schools and libraries support fund (from funding years 2001 through 2004). FCC Public Notice, CC Docket No. 02-6, *Wireline Competition Bureau Announces Carryover of Unused Funds for Funding Year 2007*, DA 07-2470 (rel. June 11, 2007).

schools and libraries program by more than three times that amount without even seeking any public comment on its action.

There is no public policy reason for imposing a "remedy" for a problem that does not exist, or, at the most, is overstated by the Joint Board. While there may be reason for concern regarding trends in the growth of the high-cost fund, as Centennial suggests, it is important not to lose sight of the fact that both the Joint Board and the Commission are committed to reforming the universal service program as quickly as possible, and there is no evidence in the record suggesting that the high-cost fund cannot remain viable until these reforms are in place.[48]

While the Joint Board maintains a cap would be limited to 18 months, we note that there is significant concern that the duration of the cap may turn out to be more than temporary.[49] Indeed, some parties, nervous about the capacity of the Joint Board and the Commission to adhere to the 18-month timetable promised by the Joint Board, have argued that the duration of the proposed cap should be longer than the period proposed by the Joint Board.[50] While RCA and ARC acknowledge that the performance of the Joint Board and the Commission to date does not instill confidence in the timetable presented by the Joint Board in the *Recommended Decision*, nonetheless the Joint Board's commitment to action should be given due consideration. This is

[48] *See* RCA and ARC Comments at 8-12 (comprehensive reform is the best means of addressing issues associated with growth in the high-cost fund).

[49] During the hearing on universal service reform last week before the full Committee on Science, Commerce and Transportation, Senator Mark Pryor pointed to historical examples of how "interim" measures by the Commission turned into permanent changes.

[50] *See, e.g.*, Verizon Comments at 5. *But see* RICA Comments at 2-3 (arguing that a fixed sunset of 18 months from the effective date of the cap should be imposed).

especially true in light of the fact that the Joint Board's most recent solicitation of comments[51] has created a fresh record and sets the stage for the expeditious adoption of long-term reform.

Notwithstanding the hope that the Joint Board's 18-month timetable proves accurate, the presence of a cap would risk prolonging stalemate in the efforts to adopt universal service reform and interfering with the ability of the Joint Board and the Commission to complete their work. Several commenters share this concern.[52] RCA and ARC agree that extending the duration of the cap may risk further delay of the decision-making process.

RCA and ARC also disagree with WSTA's novel argument that imposition of the cap will have the effect of bringing all the parties together to address universal service reform issues on an expedited basis.[53] It is far more likely that the ILECs, who are the obvious beneficiaries of the CETC cap, will have less incentive to engage in the process of working through the issues and arriving at the solutions necessary to adopt reform.[54] The view expressed by Commissioner Copps—that the interim cap will put the universal reform imperative on the back burner and may also "inflame[] discord and disagreement among industry sectors"[55]—is a more likely scenario than the one depicted by WSTA.

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[51] *See Federal-State Joint Board on Universal Service Seeks Comment on Long Term, Comprehensive High-Cost Universal Service Reform*, WC Docket No. 05-337, CC Docket No. 96-45, FCC Public Notice, FCC 07J-2, May 1, 2007.

[52] *See* Navajo Nation TRC at 1 (urging the Commission to reconsider the use of a cap to address the situation "because we have had first hand experience that temporary actions can become long term permanent policies"); NTCA Comments at 3 (the proposed cap "may diminish the prospects for long term reform needed to sustain the high cost USF system"); RIITA Comments at 3-4; SureWest Comments at 2 ("enactment of the proposed interim cap will most likely result in further delay of the comprehensive reform that is needed").

[53] WSTA Comments at 3-4.

[54] *See* Dobson Comments at 8.

[55] *Recommended Decision*, Dissenting Statement of Commissioner Michael J. Copps, at 1-2. *See also* RIITA Comments at 4.

RCA and ARC share the concerns that the cap actually may instigate further delay in solving the critical issues faced by the Joint Board and the Commission. That risk is still another reason for the Commission to reject the Joint Board's recommendation.

### D. The Absence of Any "Emergency" Frees the Commission To Complete Its Work on Long-Term Reform Without Imposing a Disruptive and Unnecessary Cap.

As we have discussed, imposition of the cap is unnecessary and unwarranted because the Joint Board has presented no evidence or explanation of why or how the high-cost fund would become "unsustainable" before reform measures are in place. It is therefore time for the Commission to renew and reinvigorate its efforts to bring its public policy decision-making to bear on the issues at hand in the comprehensive universal service reform proceeding.

There is support in the record, from both proponents and opponents of the cap, for the Commission to lead the path to reform.[56] SouthernLINC, for example, urges the Commission to advance the public interest by "crafting meaningful permanent changes to the universal service program[,]"[57] and to reject a cap that would likely lead to extended litigation because the cap "will result in a significant competitive advantage"[58] for ILECs. Chinook suggests that, instead of imposing a CETC cap, the Commission can more effectively address growth in the high-cost fund by eliminating disbursement methodologies that enable "wireline carriers [to] receive support on a 'cost-plus' basis, meaning the more they spend, the more they get."[59]

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[56] *See, e.g.*, CompTel Comments at 4; Comspan Comments at 3; Dobson Comments at 10-12; Iowa Utilities Board Comments at 1 (the Commission and the Joint Board "need to honor the timelines for further reform contained in the Recommended Decision").

[57] SouthernLINC Comments at 19.

[58] *Id.*

[59] Chinook Comments at 5.

## III. THE COMMISSION'S SUPPOSED "WIDE LATITUDE" FOR "INTERIM" ACTION DOES NOT GIVE THE AGENCY LICENSE TO IGNORE THE DEFICIENCIES IN THE JOINT BOARD'S PROPOSAL

There is some suggestion by commenters that the Commission may expand the scope of its discretion to impose the recommended CETC cap (apparently for the purpose of avoiding or reducing the risk of any challenge to the agency's action on the grounds that the cap is unsupported and discriminatory and has an adverse effect on consumer welfare), by purporting to take an "interim" action to address an "emergency," avoid "disruption," and "preserve the status quo." These claims are without merit.

Commenters making these arguments implicitly acknowledge that, if the Commission does not claim a more expansive scope of discretion because it is only acting on an "interim" basis, then the Commission's action likely would not withstand review.

These commenters are right to be concerned. As RCA and ARC have shown, with ample support in the record of this proceeding, (i) the Joint Board has not demonstrated that the high-cost fund faces an emergency; (ii) its effort to point to an emergency rests on a contribution factor increase that has very little to do with CETC support levels and on projections of future CETC support levels that are unexplained and unsupported; (iii) the Joint Board has failed to show how consumer welfare would be adversely affected in the absence of a CETC cap; (iv) as discussed in a following section,[60] consumer welfare in rural America in fact would be harmed by imposition of the cap; and (v) as discussed in a following section,[61] the cap would violate the Commission's core principle of competitive neutrality and would fail to comply with statutory mandates.

[60] See Section IV, *infra*.

[61] *See* Section V, *infra*.

### A. Imposing a CETC Cap Would Not Address an "Emergency," Would Not Preserve the Status Quo, and in Any Event Must Be Based on Sufficient Facts and Considerations That Are Not Present in This Case.

NECA argues that courts have given the Commission "wide latitude to act" to address "pressing problems" pending reform of regulatory programs such as universal service.[62] The case relied upon by NECA[63] for this proposition has no application here. In the *1997 CompTel* case, the Commission was faced with the dilemma of attempting to implement two conflicting statutory mandates pursuant to two impending statutory deadlines. One statutory provision required that access charges must be cost-based, while the other statutory mandate (which faced a later deadline) involved transitioning to a new universal service regime involving explicit, equitable, and non-discriminatory contributions.

In the interim period before the transition to the new universal service regime could be completed pursuant to the statutory deadline (a period lasting nine months from August 1996 to May 1997), the Commission kept non-cost based charges in place[64] (even though these non-cost based charges were not consistent with the statutory mandate) because these charges provided substantial subsidies for universal service. In the Commission's view, the subsidies provided by the non-cost based rates had to be kept in place so that the universal service system would not collapse before transition to the new regime was completed.

The court concluded that the Commission made a reasonable decision in choosing between the two conflicting statutory mandates, because, if the Commission instead had opted to impose cost-based access charge requirements before the new universal service program was in

[62] NECA Comments at 4.

[63] *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1069 (8th Cir. 1997) ("*1997 CompTel*").

[64] The charges involved were carrier common line charges and transport interconnection charges for interstate minutes traversing ILECs' local switches. *Id*. at 1073.

place, "we think it apparent that universal service soon would be nothing more than a memory."[65]

The difference between the *1997 CompTel* case and this proceeding is that the former involved a real crisis, while the latter does not. To invoke *1997 CompTel*, the Commission must conclude that, absent imposition of a CETC cap, the universal service program would face palpable and imminent "unsustainability." Even NECA balks at concluding that the facts of this case fit within *1997 CompTel*, gingerly observing that "[t]he same compelling concern [involved in *1997 CompTel*] *may* well apply here."[66]

The fact of the matter is that there is no reasonable way in which the Commission can rely on *1997 CompTel* to exercise "wide latitude" in this case. The Joint Board has asserted that there is an "emergency" but, as the record bears out, the Joint Board (i) has provided no evidence lending any credibility to its assertions regarding projected growth in CETC support; (ii) has offered no detailed discussion of how the "dire jeopardy" of the fund's becoming "unsustainable" would materialize or play out in the immediate future, particularly from a consumer standpoint; and (iii) thus has deprived the public of any opportunity to evaluate and comment upon the credibility of the Joint Board's rhetorical assertions. These deficiencies in the Joint Board's portrayal of the present "crisis" carry this case a long distance away from the facts of the *1997 CompTel* case.

In further evaluating NECA's claim about the scope of the Commission's latitude for interim action, we note that, in a case involving interim license processing procedures adopted by the Commission, the D.C. Circuit held that:

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[65] *Id*. at 1074.

[66] NECA Comments at 5 (emphasis added).

> [A] reviewing court's task is not merely to rubber-stamp an agency decision; it is to ensure that the agency took a "hard look" at all relevant issues and considered reasonable alternatives to its decided course of action. . . . [W]e will uphold the Commission's decision if, but only if, we can discern a reasoned path from the facts and considerations before the Commission to the decision reached.[67]

Thus, even if a Commission action is interim, the agency must demonstrate that it has considered reasonable alternatives and there must be a demonstrable link between the circumstances of the case and the decision reached. *Neighborhood TV* presents two problems for the Joint Board's recommendation. First, the "facts and considerations" of this case do not support imposition of a CETC cap. The Joint Board has not justified its reliance on the recent increase in the contribution factor, nor has it explained the basis for its projections of CETC high-cost fund support growth. The Joint Board's failure to make those showings undercuts its claim that the sustainability of the high-cost fund is in imminent jeopardy, and, because the claim that an emergency exists is not credible, the basis for the Joint Board's recommended cap evaporates.

Second, even if the Joint Board could demonstrate that there is a need for immediate action to avert a crisis confronting the high-cost fund, there were alternatives other than a CETC cap that could have been recommended. For example, as several commenters have suggested,[68] the Joint Board could have proposed a cap on all high-cost funding. The Joint Board claimed this was not a useful alternative "because the data show less growth pressure from incumbent LECs."[69] That claim is misleading because support to ILECs is increasing on a per-line basis because they are losing access lines, yet continuing to draw the same level of support. As RCA

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[67] *Neighborhood TV v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984) (citations omitted) ("*Neighborhood TV*") (case involving interim procedures for processing television translator license applications that the Commission adopted during the pendency of an inquiry into authorization of low power television on frequencies previously allocated to the television translator service).

[68] *See, e.g.*, Chinook Comments at 2, 6-7; Dobson Comments at 12-13; New Jersey BPU Comments at 4 (observing that "capping all recipients of high-cost support will treat all providers equally"); *see also* TracFone Comments at 1-2 (stating that "[a] cap on receipt of high-cost support limited to competitive ETCs will not have a significant impact on curtailing growth of the USF").

[69] *Recommended Decision* at para. 5.

and ARC demonstrated, the amount of increased support under the current rules stands at $300 million and, as access line defections accelerate, will form a true crisis for the Commission to deal with.

Accordingly, any cap on all funding would have to be accompanied by a corresponding realignment of support on a quarterly basis so that funding increases proportionately to competitors whose served lines are increasing, and funding decreases proportionately to wireline carriers whose served lines are shrinking.

Since the "growth pressure" the Joint Board has attributed to CETCs between now and 2009 was not supported or documented in any way by the Joint Board, the Joint Board's assessment of the relative sources of upward pressure on the fund is not convincing. Moreover, given the sheer magnitude of the ILECs' draw from the high-cost fund,[70] imposition of an across-the-board cap would likely produce effective results in stemming the perceived crisis, and would have the added advantage of avoiding a violation of the competitive neutrality principle that is inherent in a CETC cap.

Embarq takes a slightly different tack from the argument advanced by NECA, claiming that the Commission has considerable discretion to adopt interim rules that "merely 'maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated.'"[71] In the *MCI Telecom* case the Commission imposed an interim freeze on the subscriber plant factor ("SPF") involved in the allocation of telephone company non-traffic sensitive subscriber plant costs between the intrastate and interstate jurisdictions. The agency based its action on its conclusion that use of SPF had dramatically increased the proportion of plant costs allocated to the interstate jurisdiction, that this trend was likely to continue, that interstate rates were being

[70] In 2006 ILEC high-cost support exceeded CETC high-cost support by about 300%. Comcast Comments at 2.

[71] Embarq Comments at 8 (quoting *MCI Telecom. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) ("*MCI Telecom*")).

driven up by this skewed allocation, and that these rate increases "spurred the prospect of by-pass" of telephone company facilities.[72] The freeze imposed by the Commission was "a means of preserving the status quo pending completion of the comprehensive [jurisdictional cost] separations package."[73] The Commission's action was challenged, *inter alia*, on the ground that the agency had a constitutional obligation to ensure that jurisdictional allocations were based on relative use of facilities, and that the use of SPF, whether frozen or not, was unconstitutional because it was not based on relative use of company plant in the respective jurisdictions.[74] The court rejected this challenge, finding that:

> What needs to be shown to uphold the FCC is that "existing, possibly inadequate rules" had to be frozen to avoid "compounding present difficulties." This standard was easily met. The record before the FCC contained substantial evidence of the need for an interim freeze of SPF. The FCC explained that the basis for the SPF freeze was to preserve its ability to implement comprehensive separations revisions in a manner that would cause the least upheaval in the industry. It is reasonable for the FCC to take into account the ability of the industry to adjust financially to changing policies.[75]

The present case does not fit within the rule followed in *MCI Telecom*. First, the proposed cap does not preserve the status quo, but instead rewrites the current rules in order to impose a discriminatory burden on one class of carriers providing services in rural America. The status quo for CETCs is the receipt of high-cost support in accordance with the currently applicable rules.

The proposed CETC cap, by contrast, would not merely freeze existing support levels, but would actually reduce support to many CETCs to a level well below what they received in

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[72] *MCI Telecom*, 750 F.2d at 139.

[73] *Id*.

[74] *Id*. at 140. The Commission's action was also challenged as "an unreasonable attempt to halt the growth of the SPF." *Id*. The court rejected this challenge, noting that the Commission reached a reasonable finding that the freeze was necessary. *Id*. at 141.

[75] *Id*. at 141 (quoting *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963)).

2006.[76] Thus, the proposed cap would not maintain the status quo and avoid compounding present difficulties, but rather would instigate a whole new difficulty, *i.e.*, interference with the ability of CETCs to maintain and expand services and facilities in rural and high-cost areas. Rather than minimizing industry upheaval, the proposed cap would generate upheaval by reducing resources to carriers who are relying on these resources to serve consumers.

Further, states that received little or no CETC high-cost support in 2006 would be cut off from receiving increased funding during the time the cap is in effect, because, under the Joint Board's proposal, CETC support is capped at the level of actual support received in 2006. Existing capital expenditure budgets, as well as ETC build-out plans on file with regulators, would have to be significantly curtailed. Thus, the cap would disrupt the availability of competitive alternatives to consumers in these states by shutting off high-cost fund support that competitive entrants otherwise would receive if the status quo were not disturbed by operation of the cap. If the Commission were to decide to impose a cap, a better way to preserve the status quo would be to cap high-cost support to all carriers and to use a base period more current than 2006.

It also is significant that the court in *MCI Telecom* observed that even "[i]nterim solutions may need to consider the past expectations of parties and the unfairness of abruptly shifting policies."[77] The proposed cap does not fare well under this test. The expectation of CETCs is that, once they are designated, they will be eligible to receive high-cost support pursuant to the Commission's rules. That expectation, of course, would be pushed to the side by the cap.

Further, the pace of this rulemaking proceeding underscores the fact that an abrupt shift in policy may occur. The Joint Board released the *Recommended Decision* on May 1. The

[76] For example, applying the cap to Nebraska, all CETCs would experience a nearly 40% reduction from current projections, in many cases falling well below their 2006 levels.

[77] *MCI Telecom*, 750 F.2d at 141.

Commission released the *NPRM* two weeks later, and comments were due 23 days after release of the *NPRM*. If the Commission were to take final action, imposing a CETC cap, pursuant to a timetable in keeping with the pace of the rulemaking thus far, such action certainly would constitute an abrupt change in policy. The abruptness of this policy shift would be unfair not only because the pace of the rulemaking has not been tailored to encourage or accommodate deliberative consideration of the issues by parties who will be affected by the Commission's decision, but also because the imposition of a CETC cap would affect existing infrastructure deployment commitments made by wireless CETCs in various states and would force CETCs to scramble to reevaluate investment strategies and business plans in light of the reduction in high-cost disbursements.

Second, while *MCI Telecom* focused on the impact of the Commission's action on the telecommunications industry, the focus here must also be on *consumers* because the Communications Act of 1934 ("Act") provides that the beneficiaries of universal service are consumers, not any segments of the telecommunications industry.[78] As RCA and ARC have made clear,[79] and as is further demonstrated in a following section,[80] when viewed through the prism of consumer welfare, the Commission must conclude that imposition of the proposed cap would have direct and adverse consequences for consumers in rural America. This failure to preserve and protect the interests of consumers in rural America cannot be said to maintain the status quo, as required by the *MCI Telecom* test.

Finally, the court noted in *MCI Telecom* that the record before the Commission contained "substantial evidence" supporting the agency's action. The Joint Board has presented *no* evi-

[78] *See Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("*Alenco*").

[79] RCA and ARC Comments at 16-24.

[80] *See* Section IV.B., *infra*.

dence. The Joint Board simply has not made a case that the proposed cap is required to prevent harm to consumers or to rescue the fund from unsustainability.

While Embarq relies on *2002 CompTel* for the proposition that "the Commission can justify a policy by reference to the purposes of avoiding disruption pending a broader reform,"[81] the Joint Board's proposed cap does not meet this test because it would precipitate, rather than avoid, disruption in the industry and in the provision of services to consumers. Embarq may have intended to suggest that the "disruption" to be avoided by imposition of the proposed CETC cap would be that caused by the "unsustainability" of the high-cost fund. That suggestion would be wrong. While the disruption the cap would cause for CETCs and the customers they serve in rural America is certain and readily measurable, the projected unsustainability of the fund exists only in the rhetoric of the Joint Board and is not supported by any credible data or analysis provided by the Joint Board or by Embarq or any other proponents of the cap.

Moreover, Embarq relies upon but does not discuss another court decision[82] that in fact does not serve to advance Embarq's argument. In the *ACS* decision, the court upheld an interim cost allocation requirement imposed by the Commission, pursuant to which local exchange carriers were required to allocate traffic-sensitive costs associated with calls to Internet service providers ("ISPs") to the intrastate jurisdiction in order to avoid a mismatch between the allocation of revenues and costs. Since the agency required tariff revenues from ISP traffic to be allocated to the intrastate jurisdiction, "it makes sense to allocate the costs there as well."[83]

In turning back a challenge to the reasonableness of the cost-revenue matching principle from an economic perspective, the court held that the Commission was not required to justify its

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[81] *Competitive Telecom. Ass'n v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002) ("*2002 CompTel*"), *cited in* Embarq Comments at 8 n.15.

[82] *ACS of Anchorage v. FCC*, 290 F.3d 403 (D.C. Cir. 2002) ("*ACS*"), *cited in* Embarq Comments at 8 n.15.

[83] *Id*. at 409.

reliance on the principle in economic terms, but only in terms of the "principle of regulatory orderliness," in that the agency's treatment of ISP calls was a derivative of its prior policy of temporarily exempting ISPs and other enhanced service providers ("ESPs") from paying interstate access charges. The court concluded that "because we must take the ESP exemption as a given, . . . the principle of regulatory orderliness indeed supports the Commission[,]" especially since the Commission's action was taken on an interim basis while it pursued reform of the existing regime.[84]

This principle of "regulatory orderliness" has no application here. Unlike *ACS*, in which the Commission was merely continuing to apply a derivative rule that the court found must be taken as a given, the proposed cap does not have any antecedents that would make its application "orderly."[85] The relevant antecedents here are the flow of high-cost support pursuant to the Commission's rules and the Commission's principle of competitive neutrality which dictates, *inter alia*, that high-cost revenues be disbursed in a manner that does not give any particular class of carriers an unfair competitive advantage. The proposed cap would have the effect of suspending the high-cost rules en route to violating competitive neutrality.

In making the arguments discussed above, proponents of the proposed CETC cap seem to suggest that the Commission may be able to impose the cap—notwithstanding the fact that the record does not establish any emergency requiring precipitous action to sustain the high-cost fund, that there is no data or analysis in the record supporting the Joint Board's reliance on the recent increase in the contribution factor or explaining the basis for the Joint Board's projections of high-cost fund growth, that no case has been made by the Joint Board or supporters of the cap

[84] *Id.* at 410.

[85] For reasons discussed in Section V.B.1., *infra*, the existence of caps on various disbursements to ILECs does not constitute any violation of competitive neutrality and cannot be used as a justification for imposing a CETC cap on high-cost disbursements.

that consumer welfare would suffer if a cap is not imposed, and that the CETC cap is discriminatory on its face and in clear violation of the Commission's principle of competitive neutrality—so long as the Commission casts its action as an "interim" step to preserve the status quo and avoid disruption while it completes work on comprehensive reform.

Any leeway that the Commission may have to take action that may not be consistent with applicable requirements and precedent is not present here, as illustrated by the facts involved in the cases cited by supporters of the cap and by cases such as *Neighborhood TV*. In order to carry their argument that the Commission may ignore the multiple deficiencies riddling the Joint Board's recommendation for the imposition of a cap, proponents must show that the situation faced by the Commission is so grave that relaxation of the laws and rules and precedents that otherwise would bind the Commission, is essential for the purpose of averting a crisis. And, in any event, even in "difficult circumstances" the Commission must show that "what it has done is reasonable."[86]

RCA and ARC respectfully urge the Commission to determine whether there is anything in the arguments and record before it that brings this case within the boundaries of the criteria established by the courts for permitting expansive interim action by the agency, or that demonstrates that the proposed cap would be "reasonable" in the circumstances. We submit that there is not.

### B. Purporting to Act on an Interim Basis Would Not Insulate the Commission's Action from Judicial Review.

If the Commission were to impose a CETC cap, and to defend its action on the grounds that it was merely taking an "interim" step prior to adopting and implementing universal service reform, it is important to observe that the agency's action would still be subject to judicial re-

[86] *National Ass'n of Reg. Util. Com'rs v. FCC*, 737 F.2d 1095, 1141 (D.C. Cir. 1984).

view. Thus, "even an interim rule expected to be in place for only a brief time is subject to judicial review, or agencies would be free to act unreasonably for that time."[87] Thus, any decision by the Commission to impose a CETC cap will be subject to judicial scrutiny, regardless of whether the Commission characterizes its action as "interim," and regardless of how long the action is in effect. Moreover, the underlying record leads inexorably to the conclusion that an "interim" cap would not survive judicial review.

## IV. IF THE COMMISSION CHOOSES TO IMPOSE A CAP ON CETC DISBURSEMENTS, CONSUMERS IN RURAL AND HIGH-COST AREAS WILL SUFFER THE CONSEQUENCES

Having shown in Section II.A., *supra*, that the cap recommended by the Joint Board is not necessary to avoid harm to consumer welfare, RCA and ARC will now demonstrate that the record supports a conclusion that the cap would in fact have the opposite effect. The arguments made by commenters, which mirror the case RCA and ARC present in their Comments,[88] are grounded in the commonsense observation that capping high-cost support to CETCs will chill market entry and investment, will interfere with the maintenance and expansion of services in rural and high-cost areas, and will therefore be detrimental to consumers.

### A. CETC Investment in Rural and High-Cost Areas Would Be Adversely Affected by the Proposed Cap.

The Commission, in weighing the advisability of imposing a cap on CETC high-cost fund disbursements, must consider the impact the cap would have on rural America. This consideration begins with an assessment of the effect that such a cap would have on CETC operations and business decisions.

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[87] *Competitive Telecom. Ass'n v. FCC*, 87 F.3d 522, 531 (D.C. Cir. 1996), *quoted in* Alltel Comments at 9.

[88] RCA and ARC Comments at 16-24.

As CTIA observes, the Commission has concluded that "[u]nequal funding could discourage competitive entry in high-cost areas and stifle a competitor's ability to provide service at rates competitive to those of the incumbent."[89] The proposed cap, of course, would impose unequal funding, therefore producing the results feared by the Commission.[90] Moreover, there is broad support in the record for the conclusion reached by RCA and ARC that CETCs' deployment of infrastructure in rural and high-cost areas would be adversely affected by the proposed cap. Even AT&T, a supporter of the cap, indicates that the proposed cap "*undoubtedly* will impose some burdens, at least in the short term, on CETCs . . . by reducing the amount of high-cost funding available to deploy and maintain facilities used to serve high-cost customers[,] and complicating investment decisions."[91] DTS argues that the proposed cap would not serve the public interest because CETCs "are using high-cost funding effectively to deploy telecommunications services to consumers in very rural, unserved and underserved areas where service has not been available or affordable in the past."[92] Corr correctly observes that "wireless carriers . . . have the

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[89] *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 20432, 20480, para. 90 (1999), *quoted in* CTIA Comments at 26.

[90] Some commenters have been critical of efforts to encourage CETC entry in rural markets, claiming that USF funds should not be used to support "artificial competition." *See, e.g.*, NTCA Comments at 10-11. Professor Jim Chen has exposed the flaws in this argument:

> The trouble with condemning universal service support for competitive carriers as "artificial," . . . is that incumbent rural telephone companies are themselves the products of public policies consciously adopted and deliberately intended to subsidize telecommunications service in remote areas where the cost of delivering service is extremely high. Incumbent carriers cannot simultaneously condemn policies extending subsidies to their competitors and demand the continued flow of support to their own coffers. When an incumbent carrier depends so heavily upon public largesse, a public decision to subsidize a competitor is no more "artificial" than the incumbent's dominance of that market is "natural."

*Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of Rural Cellular Association and the Alliance of Rural CMRS Carriers, May 5, 2003, Exhibit 2 (Jim Chen, "Managing Universal Service in the Public Interest") at 9.

[91] AT&T Comments at 2 (emphasis added). AT&T also notes that the burdens it identifies "will be well worth it if they lead finally to more fundamental reform." *Id*. at 2-3. RCA and ARC strongly disagree. There simply is no nexus between the imposition of discriminatory burdens on CETCs and the Commission's accomplishing its task of adopting universal service reform.

[92] DTS Comments at 4. DTS is a facilities-based provider of services using mobile satellite service. *Id*. at 1.

most pressing need for capital expenditures to build out service in presently underserved areas, areas where phone service is spottiest and the number of competing carriers is limited. . . . If anybody needs access to high cost support, it is rural wireless carriers."[93]

CTIA mirrors this point, stating that "wireless networks preferred by customers are still expanding into rural areas, evidencing a much greater need [than the need of ILECs] for continued high-cost support."[94] Sprint Nextel also describes the effects of the proposed cap, noting that the cap could discourage competitive entry and expansion, and undermine CETCs' "ability and willingness to invest aggressively in rural and other high-cost markets."[95] The record thus reflects very real concerns—from both opponents and a supporter of the cap—about the impact of a CETC cap on infrastructure deployment and investment decisions.

This impact is not "speculative," as NASUCA claims.[96] Mid-Rivers provides a real world example. Its rural wireless subsidiary, Cable & Communications Corporation, is currently implementing a five-year construction plan submitted to the Montana Public Service Commission. Construction for 2005 and 2006 has been completed, and construction for this year is well under way. High-cost support is critical to this construction, and, without this support rural areas

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[93] Corr Comments at 4.

[94] CTIA Comments at 10.

[95] Sprint Nextel Comments at 10. ETS, a CETC that "relies on its own cost study rather than on the 'identical support' rule[,]" ETS Comments at 1, argues that the cap would create a perverse disincentive on investment:

> If as a result of the cap ETS could no longer predict whether it would be able to receive the full and sufficient amount of high-cost support to which it otherwise would have been entitled, it would become more difficult to obtain funding for new investments, especially new build-outs. By chilling new investment in unserved areas, and by denying sufficient and predictable support for areas already served, application of the cap to cost-based ETCs would be contrary to the letter and purpose of the Act.

*Id*. at 5. RCA and ARC assert that the cap would have exactly the same effect on all CETCs.

[96] NASUCA Comments at 6. NASUCA has expressed support for the cap, even though it concludes that the emergency perceived by the Joint Board has been caused in part "by the failure of the Commission and of the joint Board to act in a coordinated fashion on many of the issues that have previously been put out for comment." NASUCA Comments at 2 (footnote omitted). For reasons we discuss, we believe that NASUCA's position in support of the proposed cap is short-sighted at best.

in Montana "would remain un-served and without access to the wireless services that are necessary for public safety and emergency communications."[97] The Montana PSC generalizes from the Mid-Rivers example, stating that imposition of "a cap on the amount of [high-cost support CETCs] receive may put in jeopardy the build out commitments of some Montana CETCs. This may occur because the dilution of [high-cost] receipts, and in turn universal service, is inherent to the FCC's interim cap proposal."[98]

The concerns of Mid-Rivers and the Montana PSC illustrate that the effects of the CETC cap are very real. The impact the proposed cap would have on Missouri consumers provides another example. The same is true in Missouri. U.S. Cellular Corporation was designated as an ETC there this month, and has promised 39 new cell sites to rural Missouri in the near-term. Those plans would have to be completely abandoned if a CETC cap were imposed because Missouri would not receive enough support under the 2006 cap to build even one new cell site. In Oklahoma, a member of the state commission Staff recently testified that the proposed cap would result in a Oklahoma's CETCs receiving only 50% of the support they received in 2006, a reduction in support that would adversely affect their ability to meet universal service commitments.[99]

It is remarkable that the Joint Board would even contemplate implementing a policy that would curtail or bring a halt to CETC construction projects aimed at expanding services to con-

[97] Mid-Rivers Comments at 5.

[98] Montana PSC Comments at 5. CTIA argues that, if a CETC cap is imposed, "wireless ETCs should be permitted to revise their buildout plans to reflect significant reductions in current and future high-cost funding." CTIA Comments at 29.

[99] Application of Choice Wireless d/b/a Amerilink Wireless Communications for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996, Cause No. PUD 20070089, Testimony of Barbara L. Mallett (filed Jun. 1, 2007) at 1-2 ("Staff estimates that Oklahoma's CETCs will receive roughly half of the high-cost support they received during 2006. Many have committed to fund a system build out anticipating the prior, higher, funding amount. Designation of additional CETCs will further reduce their ability to meet commitments incurred in support of Universal Service by lowering even more the amount of high-cost support each may receive under the proposed interim cap.")

sumers in rural America. But that is a very real possibility if the cap recommended by the Joint Board is imposed.

Returning to a point made by Sprint Nextel, wireless CETCs are making investment decisions based upon whether high-cost support will enable them to enter rural and high-cost markets and deploy facilities in order to compete with ILECs in those areas. The Commission, a long-time proponent of this market entry and competition, must not ignore the fact that the proposed cap will "undoubtedly"—as AT&T points out—impose burdens in conflict with those policy goals.

In evaluating the effects of the cap on market entry and infrastructure deployment, supporters of the cap have offered arguments that are unpersuasive and should be rejected. For example, CenturyTel seeks to reassure the Commission that it need not be troubled by wireless CETCs' concerns about being harmed by the cap, arguing that "[t]he interim CETC cap would not stop support of wireless service in rural markets but rather would maintain support at 2006 levels. Therefore, wireless service in rural markets will not be negatively impacted by the Joint Board's recommended decision to cap CETC support."[100]

This argument is not persuasive. CenturyTel ignores the fact that many CETCs could experience immediate and significant cuts in high-cost funding as a result of the cap. Although stopping disbursements to CETCs altogether would be even more deleterious than a cap, it does not follow (as CenturyTel seems to believe) that a cap would have no adverse effects. A reduction in otherwise available disbursements—which, of course, is the point of the cap—will diminish the capability of CETCs to maintain existing operations and deploy infrastructure to expand

[100] CenturyTel Comments at 8.

service. Moreover, as DTS demonstrates,[101] in some states (those not receiving any CETC support in 2006) CETC funding would be blocked during the period of the cap, and this would harm consumers by depriving them of competitive alternatives.[102]

Having failed to demonstrate that CETCs will not be adversely affected by the proposed cap, CenturyTel presses on to raise an allegation that requires some parsing. CenturyTel asserts that, while CETCs continue to receive disbursements from the high-cost fund, they "have been experiencing few concomitant increases in costs or obligations" because they "continue to lag behind the wireline industry," citing as an example the alleged failure of CETCs to meet consumer protection and public interest obligations "in many markets[.]"[103] The intended implication of this argument may be that, given these supposed shortcomings, CETCs should not be heard to complain about the burdens stemming from imposition of the cap.

CenturyTel's claims are simply wrong. It provides no complaint data to support its statement. Also, CenturyTel ignores the fact that, unlike wireline service, wireless is intensely competitive and therefore inadequate service quality must improve or customers will turn to alternative providers. The Commission has indicated that industry analysts stress that competition to attract and retain customers puts pressure on wireless carriers to improve service quality.[104]

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[101] DTS Comments at 4 ("[I]n a state where a CETC . . . has not yet entered markets, capping support at 2006 levels would make it difficult or impossible to do so. This is particularly problematic in states where CETCs received zero support in 2006 (such as Idaho), or states where only very small amounts of CETC support were available in 2006 (such as Nevada)"). RCA and ARC stressed this same point in their Comments. RCA and ARC Comments at 20, 26-27.

[102] For similar reasons, the claim by ITTA that the cap "protects current supported entities and their customers" is without merit. *See* ITTA Comments at 5.

[103] CenturyTel Comments at 5. The allegedly unfulfilled obligations include "compliance with the FCC's mandates, improvements in call completion and quality of service standards, and resolution of customer billing complaints." *Id*. (citing Sarmad Ali, *The 10 Biggest Problems With Wireless and How to Fix Them*, WALL ST. J., Oct. 23, 2006, at R1 ("Ali Article")). For purposes of these Reply Comments, citations are to the Ali Article in the online edition of the WALL STREET JOURNAL at http://online.wsj.com/article/SB116120231104396746.html (viewed June 21, 2007).

[104] According to the senior director of wireless services at J.D. Power and Associates:

Indeed, the Ali Article cited by CenturyTel emphasizes that wireless providers are taking aggressive measures to improve service quality and customer service.[105] Moreover, CenturyTel's claim, which holds true only insofar as wireless consumers receive poor coverage in rural areas, only underscores the need for uninterrupted, indeed, increased, support to wireless carriers seeking to improve coverage in rural America which directly leads to increased consumer satisfaction.[106]

### B. Consumers Would Be Directly Harmed by Reduced Wireless Infrastructure Deployment Caused by the Cap.

Those who may doubt whether consumers in rural America will be harmed by the imposition of a CETC cap need only turn to the record of this proceeding, which reflects an outcry from the American public informing the Commission that the proposed cap would indeed harm consumer welfare. Over 3,200 members of the public have expressed this concern, telling the

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> It's clear that wireless providers have made great strides in improving the quality of calls, especially in those areas that impact customer churn the most, such as calls that are dropped or disconnected. With an increasingly competitive environment and an increase in the number of services used in conjunction with a cell phone, carriers that offer superior network quality will improve their likelihood of attracting new customers and will increase customer retention. In fact, improving network quality is a beneficial financial incentive for wireless carriers, as customers experiencing at least one call quality problem are three times more likely to indicate they 'definitely will' switch carriers in the future.

*J.D. Power and Associates Reports: The Number of Call Quality Problems Experienced With a Wireless Service has Declined for a Second Consecutive Year*, Press Release, J.D. Power and Associates, Mar. 16, 2006, *quoted in Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993–Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Eleventh Report*, 21 FCC Rcd 10947, 10999, para. 130 (2006) ("*Eleventh CMRS Competition Report*").

[105] Ali Article at *1:

> The good news is that companies are scrambling to come up with solutions to those longstanding complaints. Cellular carriers are improving their networks, streamlining their bills and improving their customer service. And technology start-ups are pitching in, introducing gadgets that let consumers do everything from make their phones more durable to boost reception in their home.

[106] The Ali Article cites poor coverage in rural areas as a major concern: "But most 'white spaces,' the industry term for coverage gaps, are in rural areas that aren't heavily populated, says Marina Amoroso, an analyst at Yankee Group. Since there are fewer potential customers to supply revenue, carriers often don't build infrastructure there." *Id*. at *2.

Commission, for example, that "rural Americans deserve the same access to telecom services that are available in the rest of the country[,]"[107] that "if the recommended cap is implemented, many communities may never realize [the] benefits" of economic growth and will be less able to rely on wireless communications in emergency situations,[108] and that "[c]apping the fund will shut the door on rural America. Less USF support for rural wireless networks will leave us with poor coverage, dropped calls and dangerous dead zones. The urban/rural technology gap will only widen."[109]

RCA and ARC stressed in their Comments the public safety and economic development benefits provided by wireless services in rural America.[110] The record offers further proof of this. In addition to the comments of thousands of Americans mentioned above, public safety organizations and other government agencies, as well as other commenters, echo the view that rural Americans increasingly recognize and seek to benefit from the unique capabilities of wireless

[107] Nancy Roy Comments at 1. Some proponents of the CETC cap seem to disagree with Ms. Roy. Thus, TAM singles out two wireless ETCs in Maine for criticism, alleging that neither company has used high-cost funds to build networks in areas where customers currently are unable to receive any telephone service, but instead have used the funds to deploy infrastructure in areas where customers are already able to receive service from at least one carrier. TAM Comments at 1. TAM misunderstands the purpose of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), in seeking to introduce competition into rural and high-cost areas. A central purpose of the 1996 Act, in opening up local exchange markets—"one of the last monopoly bottleneck strongholds in telecommunications"— in rural areas and elsewhere across the country, was to "bring new packages of services, lower prices and increased innovation to American consumers." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15506, para. 4 (1996) ("*Local Competition Order*"). This goal of opening local markets to competition must be accorded equal importance with the goal of preserving and advancing universal service. The activities of wireless ETCs such as those TAM discusses serve both these goals, by giving consumers in rural America access to services that are available in urban areas (in keeping with Ms. Roy's concerns), and by providing these customers with a competitive alternative that delivers a wide range of innovative services at affordable prices. Moreover, by asserting that those wireless ETCs have used support to serve areas "already served" by ILECs, TAM ignores the fact that, by offering mobile wireless service, those carriers offer service over a far greater territory than that covered by the wireline service offered by TAM's members. Indeed, wireline service is useless to a stranded motorist on a lonely road.

[108] Robert Hal Phillips Comments at 1.

[109] Michael Lagorio Comments at 1. *See also* Betty S. Thomas, Mayor, Pleasant Hill, Louisiana, Comments at 1; Representative Harold J. Brubaker, North Carolina General Assembly, Comments at 1; Senator Lavon Heidemann, Nebraska State Legislature, Comments at 1 ("I have received numerous contacts from residents of my Legislative District expressing their displeasure with the proposed cap.").

[110] RCA and ARC Comments at 17-21, 23. *See also, e.g.*, Comspan Comments at 11 (stating that "[i]t should be abundantly clear that competition in high cost areas is good for consumers").

carriers to provide reliable communications links during emergencies. Thus, the Sheriff of Rock County, Minnesota, comments that he has witnessed firsthand the benefits of expanded wireless service and is convinced that wireless service "is a critical instrument in emergency situations[.]"[111] Many other law enforcement officials and first responders have expressed their concerns about the impact the proposed CETC cap would have on their ability to do their jobs.[112] Sheri Hokamp, a Public Safety Answering Point ("PSAP") supervisor in Biloxi, Mississippi, makes this point in compelling terms:

> In emergency situations, citizens/visitors involved in an emergency/crisis are sometimes unable to seek our help through the 911 system due to poor cell phone coverage. Our ability to rapidly respond in a medical crisis is especially important. Time is critical in the outcome of an emergency situation, and unfortunately precious time is often lost when our help cannot be summoned by cell phone. Quite simply, we cannot provide response rescue services to citizens and visitors in crisis if they cannot call us.[113]

Navajo Nation TRC, in addressing public safety and other benefits, explains the importance of wireless service in rural communities:

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[111] Evan Verbrugge (Sheriff, Rock County Sheriff's Office) Comments at 2. *See also* John W. Gibson (County Administrator, Washington County, Arkansas) Comments at 2. Moreover, the president of the National Grange, in a recent newspaper column criticizing the Joint Board's proposed CETC cap, pointed to natural disasters in the Midwest and other regions of the country this year and observed that:

> Wireless services not only have saved lives but also allowed first responders to better coordinate their relief efforts, all because of access to wireless services in rural communities. It is unlikely that the residents of these communities believe, as the Joint Board apparently concluded, that our nation today invests an excessive amount of resources into ensuring that all Americans have access to reliable wireless telephone service.

Bill Steel, Op-Ed., *Limiting Wireless Access*, Wash. Times, June 11, 2007, accessed at http://www.washingtontimes.com/op-ed/20070610-100551-3686r.htm.

[112] *See, e.g.*, Wes Ashley, Director, Martinsville-Henry County 911 Center, Collinsville, Virginia, Comments at 1; Ken Jones, Sheriff, Union County, El Dorado, Arkansas, Comments at 2; Allen C. Holder, Director, 911 Communications, Lincoln County, West Virginia, Comments at 1; Bob Andrews, Director, E911 Communications Center, Craighead County, Jonesboro, Arkansas, Comments at 1; Julie Murie, 9-1-1 Manager, Cottonwood Police Department, Cottonwood, Arizona, Comments at 1; Marlys Sorlie, PSAP Manager, Mower County, Minnesota, Comments at 1-2; Carlos W. Herring, Sheriff, Perry County, Mississippi, Comments at 1 ("[F]or citizens needing assistance it is impossible in some places to make an emergency call with a cell phone. As I am sure you can appreciate, this greatly impedes our ability to provide services to residents and visitors in Perry County."); Kelly D. Olsen, 911 Coordinator, Deuel County, South Dakota, Comments at 1.

[113] Sheri Hokamp, Communications Supervisor (PSAP), Police Department, Biloxi, Mississippi, Comments at 1.

> The growth of the Navajo Nation depends on the wireless telecommunications services provided by various telecommunications carriers. A cap on wireless technology deployment will impact the tribe in a negative way. The 27,000 square miles of Navajo Nation lands cannot, in the near future, be hardwired to accommodate the growth of its communities. Our schools need wireless distance learning capabilities, our hospitals need telehealth capabilities, the safety of our communities requires E911 capabilities, the sustainability of our economic and community developments need geographical information systems, and we need to maintain an E-government environment to consistently keep up with the growth of our people.[114]

In addition, SouthernLINC draws particular attention to the "critical public safety benefits of mobile wireless service[,]"[115] pointing out that wireless networks are the "carrier of only resort" in many disaster situations.[116]

At the Senate committee hearing on universal service reform last week, Everett B. Flannery, Jr., Sheriff of Kennebec County, Maine, from 2001 to 2006 and current spokesman for the Maine Sheriffs' Association, provided testimony on the many ways in which law enforcement and emergency responders use commercial mobile radio services in emergencies and police work. He described how poor wireless coverage in rural areas makes it less likely that a citizen can make a timely call to law enforcement officials in the event of an emergency, such as an automobile accident, a snowmobile/ATV crash, a hunting mishap, or a logging accident. In short, Mr. Flannery's testimony underscores the profoundly adverse effect that a cap on CETC support would have on public safety in rural areas.

In addition to the public safety benefits provided by wireless CETCs, and the opportunities for economic development that flow from the deployment of wireless infrastructure in rural

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[114] Navajo Nation TRC Comments at 1. *See also* Letter from Dr. Joe Shirley, Jr., President, The Navajo Nation, to Kevin J. Martin, Chairman, FCC (May 24, 2007); Navajo Nation Telecommunication Regulatory Commission, Resolution #NNTRC-07-002, *Capping of the High Cost Portion of the Universal Services Fund* (May 31, 2007) (opposing imposition of a cap).

[115] SouthernLINC Comments at 20 (footnote omitted).

[116] *Id*. at 21. *See also* Alltel Comments at 19 ("mobile 911 and E-911 are vital health and safety services"); Chinook Comments at 2; Montana PSC Comments at 6 (discussing consumer and economic benefits of mobile wireless service).

America, the availability of wireless services has real pocketbook benefits for individual consumers. For example, while average wireline local telephone bills have remained about the same for a number of years,[117] the cost of wireless service has dropped dramatically, from 43 cents per minute in 1995 to 7 cents per minute in 2005 (the most recent year for which data is available).[118] Average monthly bills for wireless service decreased by 18.7% from 1993 through 2005.[119] No analysis of consumer welfare as a result of universal service contribution burdens is complete without a corresponding analysis of the consumer benefits of lower prices as a result of consumers being able to choose wireless service—and to receive Lifeline and Link-Up discounts if they qualify under the FCC's low-income rules—in areas where signal quality is improved.

The record also sheds light on another critical point that the Commission is urged to take into account—wireless service is the future of voice communications and consumers are increasingly demanding the unique benefits that wireless service provides. Conversely, wireline subscribership and usage are on the decline—a fact most recently illustrated by NECA's June 2007 report on wireline interstate minutes of use ("MOU"), which showed a steady decline in MOUs from April 1, 2006, to March 31, 2007, representing a 5% total decline for that period.[120] Thus, Centennial presents extensive statistics to support the view that "[t]oday wireless service is far and away *the* basic, dominant means by which residential customers obtain telephone service in the United States."[121] Centennial then raises a telling question for the Commission's considera-

[117] *See* RCA and ARC Comments, Exhibit 2 ("Average Wireline Residential Local and Long Distance Telephone Bills Plus USF Contribution Surcharge"). It also should be noted, however, that, in many rural areas, customers of wireline local exchange companies often face significant monthly intrastate long distance bills, because the generally small local calling areas include only a few hundred or thousand residential or business lines.

[118] *See id*., Exhibit 3 ("Per-Minute Cost of Wireless Service (Including USF Contributions) (1995-2006)").

[119] *Eleventh CMRS Competition Report*, App. A, Table 10.

[120] National Exchange Carrier Association, MOU Data/Summary of NECA Pool Results (June 15, 2007).

[121] Centennial Comments at 7 (emphasis in original). *See also* Alltel Comments at 19; Chinook Comments at 2 (arguing that the proposed cap would amount to "favoring the incumbent landline technology which consumers in-

tion: "[W]hy would it make sense to limit payments to the carriers who are providing more supported services—and increasing their costs while doing so—but leaving unchanged the payments to the carriers who are providing less supported services over time, and who are shedding costs while doing so?"[122]

Any action by the Commission curtailing wireless deployment in rural areas—as the cap surely will—would go against the tide of consumer demand in rural America, and would frustrate the capability of wireless CETCs to meet this demand.

In sum, consumer welfare is a vitally important issue to be weighed in the balance as the Commission evaluates the advisability of adopting the Joint Board's proposed CETC cap. The direction in which the scale is tipped is clear. A CETC cap unavoidably would force CETCs to cut back on construction projects already under way, and would cause CETCs to reevaluate investment plans and deployment projects in rural and high-cost areas.

These consequences of a CETC cap undoubtedly would flow through to rural consumers, adversely affecting public safety and economic development, depriving consumers of competitive choices, and frustrating their desire to share in the benefits of wireless services.

## V. THE RECORD DEMONSTRATES THAT THE PROPOSED CETC CAP WOULD VIOLATE THE COMMISSION'S PRINCIPLE OF COMPETITIVE NEUTRALITY, AND WOULD ALSO VIOLATE THE STATUTE

In addition to addressing the issues that RCA and ARC have presented in the previous sections, the Commission, in reviewing the Joint Board's recommendation, also must confront the fact that there is compelling evidence in the record supporting the argument advanced by RCA and ARC that the proposed cap violates competitive neutrality on its face, and that neither

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creasingly realize can be less useful in rural areas"); Nebraska and South Dakota Companies Comments at 7 ("[t]here is no argument that customers desire availability of wireless service in rural America"); John W. Gibson (County Administrator, Washington County, Arkansas) Comments at 1 ("Consumers in rural parts of Arkansas are no longer content to have access to only traditional wireline telephone service.").

[122] Centennial Comments at 8.

the Joint Board nor any of the commenters supporting the proposed cap offer a reasonable basis for reaching a different conclusion. The record also demonstrates that the proposed CETC cap would violate principles enacted by Congress in Section 254(b) of the Act.[123]

### A. There Is Extensive Support in the Record for the Position of RCA and ARC That the CETC Cap Inherently Violates Competitive Neutrality, and That the Joint Board Offers No Justifications for the Cap That Could Overcome this Violation.

In examining the issue of whether the proposed CETC cap is competitively neutral, there are two questions to consider. The first involves whether the way in which the cap works would result in any unfair competitive advantage or disadvantage. If this analysis concludes that the cap is not consistent with the Commission's principle of competitive neutrality, then the second question is whether the Joint Board or the supporters of the cap can proffer any countervailing arguments or justifications that could somehow justify the cap.

#### 1. The Record Demonstrates That the Proposed CETC Cap Violates Competitive Neutrality.

RCA and ARC demonstrate in their Comments that the proposed cap conflicts with the Commission's core principle of competitive neutrality.[124] There is significant support for this conclusion in the record. Sprint Nextel makes the point bluntly, arguing that, given the fact that technological and competitive neutrality have been unambiguously endorsed in the past by the Joint Board itself, and by the Commission and the courts, "the Joint Board's current recommendation to impose a CETC cap represents a startling and inexplicable about-face."[125] Comspan is no less to the point, stating that "[i]n the face of the pressure of a growing fund, the Joint Board is now asking the Commission to abandon the principle of competitive neutrality by adopting

[123] 47 U.S.C. § 254(b).

[124] RCA and ARC Comments at 25-28.

[125] Sprint Nextel Comments at 7.

caps that favor the incumbent local exchange carriers and are likely to put many CETCs out of business."[126]

The Kansas Corporation Commission concludes that the proposed cap would violate competitive neutrality:

> [D]espite the Joint Board's claim to the contrary, [the CETC cap] does not appear to be competitively neutral. Abandoning the Commission's principle of competitive neutrality in the collection and distribution of USF support will distort the competitive marketplace. Any reform of the USF should retain the principle of competitive neutrality. . . . A cap on the support paid to CETCs will result in unequal payments to carriers on a per-line basis.[127]

Alltel demonstrates that the cap would violate competitive neutrality because CETCs would receive less support than ILECs even when they provide the same supported services to the identical customers. Thus, support no longer would be portable—if a rural customer migrates from an ILEC to a CETC, less support would be available to serve the consumer, giving the ILEC an artificial, regulatory-induced competitive advantage.[128] Further, DTS explains that:

> A CETC fund cap inevitably would reduce CETCs' per-line support, because even without designation of new carriers, most existing CETCs are gaining market share and their line counts are growing. At the same time, the cap would enable ILECs to increase their per-line support, because ILEC line counts are shrinking while support amounts remain constant . . . .[129]

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[126] Comspan Comments at 2. *See also* Dobson Comments at 5, 8.

[127] Kansas CC at 2-3. Kansas CC notes that it would nonetheless support the cap "if immediately stemming the growth in the high-cost portion of the USF is of greater public interest than ensuring that markets operate without regulatory interference . . . ." *Id*. at 5. As RCA and ARC have demonstrated, and as the record reflects, the Joint Board has failed to make any public interest showing to justify its claims that an immediate CETC cap is needed to avert an emergency threat to the sustainability of the high-cost fund.

[128] Alltel Comments at 3, 15. *See also* Corr Comments at 4 (arguing that access to USF funds should be both technologically and competitively neutral, but that the Joint Board's proposal discards that principle and provides "little justification for putting the regulatory thumb so heavily on the LEC side of the scales"); Midcontinent Comments at 4 (stating that the effect of the cap "will be to artificially subsidize incumbent LECs that are losing customers, essentially placing the FCC's thumb on the incumbent's side of the competitive scale, while withdrawing legitimate subsidies from facilities-based and other providers that have relied on those payments to introduce competition into high-cost areas").

[129] DTS Comments at 5.

CTIA expresses the same concern regarding the fact that the cap would result in ILECs and CETCs receiving different amounts of support, and also points out that "the proposed cap would violate competitive neutrality because it would visit the burden of controlling the size of the fund disproportionately on competitive carriers in general and wireless carriers in particular."[130] Finally, and significantly, Comcast—a supporter of the proposed cap—expresses skepticism about the Joint Board's claim that the cap would be competitively neutral, pointing out that:

> The *Recommended Decision* claims that the interim cap would not violate the principle of competitive neutrality . . . . However, the proposed approach would place all of the responsibility for reducing the fund's growth in the short run on one segment of the industry—competitive wireline and wireless providers. Moreover, although the Joint Board's analysis indicates that payments to that industry segment have been driving the recent overall growth in the fund, it bears emphasis that last year the amount of high-cost support provided to incumbent telephone companies was approximately 300% greater than the amount of high-cost support provided to CETCs.[131]

Thus, the record makes clear that the cap violates competitive neutrality. Changing the rules governing high-cost disbursement so that one class of carriers—CETCs—suffers a reduction in the amount of funds that otherwise would be received, while also ensuring that another class of carriers—ILECs—is exempt from the reduction, inherently works a competitive disadvantage on CETCs.

### 2. The Record Reveals the Deficiencies in the Joint Board's Attempt To Support Its Claim That the Proposed Cap Would Not Violate Competitive Neutrality.

The next question is whether the justifications advanced by the Joint Board for the proposed cap are sufficient to overcome the problem that the cap is not competitively neutral. Many

[130] CTIA Comments at 18. *See also* SouthernLINC Comments at 16 ("The proposed cap would freeze a flawed system in a manner that preserves money for ILECs while hurting the competitive ETCs that are most likely to bring technological innovation to underserved rural areas.").

[131] Comcast Comments at 2 (footnote omitted). *See* Chinook Comments at 3 (stating that, in 2004, ILECs received 81% of USF funding, compared to 7% received by wireless carriers); *id*. at 4 (stating that, nationwide since 1996, more than $22 billion from USF has gone to ILECs while just under $2 billion has been disbursed to wireless CETCs).

commenters have joined RCA and ARC in demonstrating that the Joint Board's justifications cannot save the cap.

One of the principal reasons advanced by the Joint Board in support of its claim that the proposed cap does not violate the principle of competitive neutrality is its argument that '[f]undamental differences exist between the regulatory treatment of competitive ETCs and incumbent LECs."[132] In this manner, the Joint Board—with no legal or factual analysis—asks the Commission to violate the Act and reverse its longstanding precedent emphasizing that high-cost support cannot be denied to a carrier simply because it is not subject to the "full panoply of state regulation."[133]

The first "fundamental difference" cited by the Joint Board is the fact that CETCs do not face equal access requirements. As CTIA correctly points out, this regulation stems from the ILECs' "historical monopoly status,"[134] imposing the requirement on CETCs would make no sense because they operate in competitive markets, and since the application of equal access requirements is strictly a function of a carrier's market power, "the presence or absence of equal access obligations . . . has no bearing on whether carriers are entitled to equivalent USF treatment."[135] Moreover, the Joint Board ignores that CETCs designated by the FCC and most state commissions are subject to the requirement that the FCC may require them to provide equal access in the event no other carrier in the relevant service area provides it, ensuring that equal access will continue to be available to consumers in the event the ILEC withdraws as an ETC.

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[132] *Recommended Decision* at para. 6.

[133] *Federal-State Joint Board on Universal Service, First Report and Order*, 12 FCC Rcd 8776, 8859, para. 147 (1997) ("*First Report and Order*") (subsequent history omitted). See also, RCA and ARC Comments at 25-31.

[134] CTIA Comments at 14.

[135] *Id*. *See also* Dobson Comments at 6-7; SouthernLINC Comments at 12 n.34; Sprint Nextel Comments at 8.

Next, the Joint Board argues that ILECs, unlike CETCs, are subject to rate regulation, and that this regulatory difference bolsters the Joint Board's claim that the cap would not violate competitive neutrality. Sprint Nextel objects to the assertion that rate regulation is disadvantageous to ILECs, pointing out that:

> [R]ate regulation has provided [ILECs] with decades of high-cost support, and decades of cost-of-service regulation complete with a generous rate of return (which is routinely exceeded). Rate regulation has enabled ILECs to recoup in full many of the costs which CETCs scramble to recover in far more uncertain circumstances (*i.e.*, in a competitive market).[136]

Since rate regulation "has no bearing on a carrier's eligibility for universal service support[,]"[137] regulation of ILECs' rates does not serve as a basis for accepting the Joint Board's claim that its proposed cap would not violate competitive neutrality.

The Joint Board also argues that, since CETCs may not have the same carrier of last resort ("COLR") obligations as ILECs, this distinction also serves to support its conclusion that the cap would not violate competitive neutrality. SouthernLINC points out, however, that the distinction is not relevant because the Commission has been successful in encouraging states to require that CETCs must have the capability to meet COLR obligations if an ILEC foregoes universal support funds in a given service area, and, in any event, this regulatory difference (to the extent it actually exists) cannot justify imposition of a cap that violates competitive neutrality because "nobody has identified carrier of last resort obligations as a potential cause of fund growth."[138]

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[136] Sprint Nextel Comments at 8. *See also* CTIA Comments at 13 (arguing, *inter alia*, that ILECs in fact are free from retail rate regulation in many states, and that wireless CETCs are free from rate regulation because Congress decided that such regulation is unnecessary in competitive wireless markets); SouthernLINC Comments at 13 n.35.

[137] Sprint Nextel Comments at 8.

[138] SouthernLINC Comments at 13 n.36. *See also* Alltel Comments at 12; CTIA Comments at 15.

The Joint Board also contends that the proposed cap would not violate the competitive neutrality principle because, under the identical support rule, support to ILECs is cost-based while support to CETCs is not. USTA supports the Joint Board's conclusion, arguing that the identical support rule generates the distribution of excess support to CETCs, and to wireless CETCs in particular (because of the operational efficiencies associated with wireless technology).[139] RCA and ARC refuted the Joint Board's conclusions in their Comments, pointing out that the FCC has on more than one occasion ruled that identical per-line support ***is*** a competitively neutral means of distributing support to competitors.[140]

Arguments offered by other commenters lend further weight to the case for rejecting the Joint Board's contention regarding the identical support rule. The commenters point out that:

- High-cost support received by ILECs is not "truly or entirely cost-based" because, for example, about one-third of the rural ILECs are average schedule companies that are not required to provide any carrier-specific cost information.[141]
- "Embedded" cost, an economically unsound standard that is used for purposes of disbursing support to rural ILECs, is not the only method by which fund disbursements are made to rural ILECs, and the other method used—rural ILECs' claimed costs compared to a national benchmark—gives rural ILECs an incentive to increase their claimed costs.[142]
- The book value of the embedded cost of capital often bears little relation to the actual economic value of capital.[143]
- Reliance on the identical support rule as a justification for the cap is "circular" because competitive neutrality mandates the equal treatment supplied by the identical

[139] USTA Comments at 5. *See also, e.g.,* ATA Comments at 3-4; NTCA Comments at 5-7 (arguing that the identical support rule should be eliminated because the rule itself violates competitive neutrality).

[140] RCA and ARC Comments at 28-31. Many commenters misconstrue "identical support" as meaning a competitor receives the same support as an ILEC. The concept of "identical per-line support" only allows a competitor to achieve the same or greater support if it first builds a network and actually captures enough consumers to draw even with the ILEC. In such a circumstance, the ILECs' costs may no longer serve as the appropriate baseline for support to all carriers.

[141] Sprint Nextel Comments at 9.

[142] *Id.*

[143] Alltel Comments at 11 (citing *Verizon Communications v. FCC*, 535 U.S. 467, 517-18 (2001)).

support rule (since this guarantees that cost and value considerations drive consumer and provider choices), and therefore any claim that a rule (*i.e.*, the identical support rule) that requires equal treatment of all competitors somehow justifies a departure from a competitively neutral policy (*i.e.*, imposition of the cap) "is simply perverse."[144]

- The identical support rule "helps establish a baseline of competitive neutrality by guaranteeing that competitors will receive the same level of funding for each former incumbent LEC customer that the incumbent would receive[, but this] competitive balance would be destroyed by the [cap], which would maintain incumbent LEC funding levels while capping the amount of fund available to competitors[,] regardless of how many lines or customers they capture from incumbents."[145]

- It makes little sense for the Joint Board to use the identical support rule to justify a CETC cap because CETCs serving non-rural areas receive support based on forward-looking costs, not embedded costs.[146]

- The Commission has already decided that basing CETCs' high-cost support on ILECs' embedded costs does not give any preferential treatment to competitors.[147]

Finally, RCA and ARC also argue in their Comments that even if the concerns raised by the Joint Board about differences in regulatory treatment were credible, these concerns would not justify ignoring the competitive neutrality principle (which is what imposition of the cap would do) because, under the Joint Board's approach, there would be no boundary or limit to anti-competitive universal service mechanisms that could be justified by making reference to existing "regulatory differences" between different classes of fund recipients.[148] CTIA agrees with this concern, noting that the purpose of competitive neutrality is to make sure that disparate regulatory treatment of functionally equivalent offerings is reduced or eliminated, but that the Joint Board's approach would reverse course by suggesting that existing regulatory differences in the treatment of similar services would justify additional differences in regulatory treatment. "This

[144] CTIA Comments at 15-16. *See also* CompTel Comments at 3.

[145] Midcontinent Comments at 3-4 (footnotes omitted).

[146] Sprint Nextel Comments at 9. *See also* Alltel Comments at 11.

[147] Sprint Nextel Comments at 9.

[148] RCA and ARC Comments at 35.

argument portends a slippery slope of government-sanctioned discrimination justifying more discrimination."[149]

In sum, the record demonstrates that the Joint Board's claim that existing regulatory differences mean that the cap would not violate the competitive neutrality principle, fails on two counts. The Joint Board cannot show that the regulatory differences it cites place ILECs at any disadvantage. Moreover, even if the Joint Board could make such a showing, then regulators should address those differences separately, not by imposing a cap that itself is inherently discriminatory, in violation of the competitive neutrality test and does not advance the purposes of the Act. [150]

### B. Proponents of the CETC Cap Present No Persuasive Arguments Supporting Claims That the CETC Cap Is Somehow Consistent with the Competitive Neutrality Principle.

In addition to attempting to support the theories presented by the Joint Board to defend its claim that its proposed CETC cap would not violate competitive neutrality, proponents of the cap also offer arguments of their own in an attempt to convince the Commission that its core principle of competitive neutrality need not stand in the way of the cap. These arguments have no merit.

[149] CTIA Comments at 12. *See also* Alltel Comments at 13; Dobson Comments at 6-7.

[150] *See Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (holding that the Commission must not only explain reasons for differential treatment of similarly situated applicants, but also must explain the relevance of differences between the applicants to the purposes of the Act).

### 1. The Existence of Caps on Certain Categories of ILEC Support Does Not Provide a Basis for Imposing the Proposed CETC Cap.

Several advocates of the cap argue that imposing the CETC cap is justified and would not violate competitive neutrality because ILECs are already subject to caps with regard to some categories of universal service support.[151]

Although supporters of the proposed cap reference the existing caps and assert that these ILEC caps demonstrate that a CETC cap would be competitively neutral, the commenters offer no persuasive arguments that the existing caps create an unfair disadvantage for ILECs, nor do they present any other rationale to support their apparent view that imposing a CETC cap that is discriminatory on its face would not violate competitive neutrality because of the ILEC caps currently in place.

In addition, Alltel explains that the identical support rule works to the ILECs' advantage here because, as a result of the rule, any cap on ILEC funding has the same effect on both ILECs and CETCs. "To the extent that the current rules limit growth in ILEC support per-line, they impose identical limits on the growth of CETC support."[152] Thus, unlike the proposed cap, the impact of the existing caps is identical on both ILECs and CETCs.

### 2. The "Specific, Predictable, and Sufficient" Principle Does Not Override the Competitive Neutrality Principle in This Case.

NASUCA asserts that the need for specific, predictable, and sufficient universal service support can override the principle of competitive necessity.[153] There are three problems with

[151] *See, e.g.,* Blackfoot Comments at 4; NASUCA Comments at 6; USTA Comments at 4; Verizon Comments at 9-10. Although the Joint Board noted the fact that various sources of support for ILECs have been capped, it did not appear to specifically rely on the existence of these caps as justification for its claim that a CETC cap would not violate competitive neutrality. *See Recommended Decision* at para. 5.

[152] Alltel Comments at 10. *See also* Dobson Comments at 5-6.

[153] NASUCA Comments at 6.

NASUCA's formulation. First, in order for the "sufficiency" principle[154] to override the principle of competitive neutrality, it must be demonstrated that the action proposed—which would have the effect of negating the competitive neutrality principle—actually is necessary to ensure that there are sufficient mechanisms to "preserve and advance universal service."[155]

As the record amply demonstrates, neither the Joint Board, NASUCA, nor any other proponent of imposing a CETC cap has made the case that the preservation and advancement of a sufficient mechanism—that is, the high-cost fund—would be in the "dire jeopardy" the Joint Board claims, in the absence of a cap. Without such a showing, any rationale for the cap disappears and assertions that the sufficiency principle may override the competitive neutrality principle become irrelevant.

Second, NASUCA misstates the sufficiency principle by implying that support to ILECs would not be sufficient. This directly contravenes the Act in that "[t]he purpose of universal service is to benefit the customer, not the carrier. 'Sufficient' funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy."[156]

Third, even if it could be shown that imposition of a cap is necessary to ensure the sustainability of the high-cost fund, it would be incumbent on the Commission to explore ways to impose a cap without sacrificing the principle of competitive neutrality.[157] As RCA and ARC explained in their Comments, one way to do this would be to combine the cap with a requirement that all high-cost funds must be fully portable so that as wireline carriers lose customers, they

[154] 47 U.S.C. §254(b)(5).

[155] *Id*.

[156] *Alenco*, 201 F.3d at 621.

[157] The Commission has found that "promotion of any one goal or principle should be tempered by a commitment to ensuring the advancement of each of the [enumerated] principles . . . ." *First Report and Order,* 12 FCC Rcd at 8803, para. 52.

also lose support.[158] Thus, NASUCA overreaches in suggesting that, if the cap is needed to preserve and advance the high-cost fund, then the cap may be imposed without any assessment of whether doing so is consistent with the competitive neutrality principle. In fact, NASUCA seems to concede this by indicating that "[i]f . . . the Commission insists on maintaining competitive neutrality, then the cap could be applied to the entire high-cost fund."[159]

### 3. There Is No Basis for the Suggestion That the Commission May Deviate from the Competitive Neutrality Principle.

Embarq argues that, because the Commission prescribed the principle of competitive neutrality, the Commission also has the authority to change or rescind the principle, and it therefore "follows that [the Commission] may also deviate from the principle for good cause . . . ."[160] Embarq is not correct. Competitive neutrality is a "core principle", just as imposing as the others contained in Section 254 of the Act. The Commission would need to conduct a rulemaking to decide whether to alter or repeal the principle, so that interested parties would have an opportunity to evaluate and comment on the Commission's proposal.[161] Moreover, the Commission would have a very high hurdle to demonstrate that it should reverse all of its prior conclusions as to why the Act requires competitive neutrality.

The *Recommended Decision* did not propose to revise or abolish the principle, instead making the claim that its proposed cap would not violate the principle. The Commission did not

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[158] RCA and ARC Comments at 32.

[159] NASUCA Comments at 11.

[160] Embarq Comments at 6.

[161] *See Reuters v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (citation omitted):

> [I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, . . . for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

seek comment on whether the principle should be modified or repealed. It would thus be beyond the Commission's authority to effect any deviation from the principle as part of its final action in this proceeding.

#### 4. The Fact That the Principle of Competitive Neutrality Is an "Additional Principle" Does Not Diminish the Commission's Obligation To Adhere to the Principle.

The principle of competitive neutrality, of course, was not legislated by Congress as part of Section 254(b) of the Act,[162] but instead was prescribed by the Commission, upon recommendation made by the Joint Board.[163] Verizon points out that the Act does not require the Commission to adopt any additional principles, and Verizon's observation seems to carry with it the implication that, since the principle is not part of the statute, it somehow is less binding on the Commission:

> Competitive neutrality is not one of the six principles in Section 254 upon which the Joint Board and the Commission must base their policies for the preservation and advancement of universal service. Rather, the Commission adopted the principle of competitive neutrality under its Section 254(b)(7) authority, which authorizes—but does not *require*—the Commission to base universal service policies on "additional principles."[164]

Any implication that the principle of competitive neutrality has some sort of second class status, and therefore merits less fidelity, is simply incorrect. Surely the Commission was not "required" to adopt additional principles, but having done so it is now bound to follow them. Moreover, by adopting competitive neutrality as a "core principle" the Commission itself has placed the principle on a par with those enacted in the statute, making it clear that the agency es-

[162] 47 U.S.C. § 254(b).

[163] *See First Report and Order*, 12 FCC Rcd at 8801-06, paras. 46-55.

[164] Verizon Comments at 10 n.17 (emphasis in original).

tablished competitive neutrality as an additional principle "upon which we base policies for the preservation and advancement of universal service."[165]

Equally as significant is the Commission's conclusion that competitive neutrality is a principle that is already firmly grounded in the statute,[166] and that the agency's "explicit recognition of competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote 'a pro-competitive, de-regulatory national policy framework.'"[167]

### 5. The Proposed Cap Cannot Be Salvaged By Claiming That Competition Is Not a Central Concern of Universal Service.

TDS argues that the proposed CETC cap would not violate competitive neutrality and, in support of this claim, asserts that "competition is not the central concern of universal service."[168] This myopic view overlooks the Act, court decisions, and Commission precedent. In fact, TDS's formulation is a misstatement—stated correctly, the issue is whether the Joint Board and the Commission, in seeking to preserve and advance universal service, have an equal obligation to promote competition. The answer, of course, is that they do.

As RCA and ARC explained in their Comments, the Commission serves a dual mandate to promote universal service and competition.[169] Moreover, contrary to the implication raised by TDS, "the Commission must see to it that *both* universal service and local competition are real-

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[165] *First Report and Order*, 12 FCC Rcd at 8801, para. 46.

[166] *Id*. at 8801, para. 48 (stating that the principle of competitive neutrality "is consistent with several provisions in Section 254 including the explicit requirement of equitable and nondiscriminatory contributions" and that the principle is embodied in Sections 214(e), 254(e), 254(f), and 254(h)(2) of the Act). *See* Comspan Comments at 8.

[167] *Id*. at 8801-02, para. 48 (quoting Joint Explanatory Statement of the Committee of the Conference (H.R. Rep. No. 458, 104th Cong., 2d Sess.) at 113).

[168] TDS Comments at 4 (citing, *e.g*., *Federal-State Board on Universal Service*, *Recommended Decision*, CC Docket No. 96-45, 19 FCC Rcd 4257 (2004) (Dissenting Statement of Commissioner Kevin J. Martin)).

[169] RCA and ARC Comments at 37 (citing Sections 251-253 of the Act, 47 U.S.C. §§ 251-253; *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999)).

ized; one cannot be sacrificed in favor of the other."[170] Finally, again as RCA and ARC made clear in their Comments, the Commission has long acknowledged these twin goals, stating that "[w]e are directed to remove . . . impediments to competition in all telecommunications markets, while also preserving and advancing universal service *in a manner fully consistent with competition*."[171]

### C. The Record Shows That the Proposed Cap Would Violate Universal Service-Principles Enacted by Congress.

RCA and ARC agree with several commenters who argue that, in addition to violating the Commission's principle of competitive neutrality, the proposed cap also would violate universal service principles enacted in Section 254(b) of the Act.[172] Sprint Nextel observes that the Joint Board did not even attempt any demonstration of the manner in which its proposed cap "'takes into account the full range of principles Congress dictated to guide the Commission in its actions.'"[173]

Sprint Nextel argues convincingly that the proposed cap would violate or undermine the principles regarding the availability of quality services at just, reasonable, and affordable rates. As RCA and ARC have demonstrated, the ability of consumers to access the benefits of wireless service, which make overall voice services much more affordable, is harmed if a cap impedes a carrier from constructing cell sites needed to deliver these benefits.

Access to advanced telecommunications services in all regions of the country is impeded by a cap. If a new cell site is cancelled, by definition consumers receive less access. Moreover, in rural areas where there remain substantial dead zones, consumers will receive ***no*** access.

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[170] *Alenco*, 201 F.3d at 608 (emphasis in original).

[171] *Local Competition Order*, 11 FCC Rcd at 15505-06, para. 3 (emphasis added).

[172] 47 U.S.C. § 254(b).

[173] Sprint Nextel Comments at 12 (quoting *Qwest Comms. Int'l v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005)). *See also* Dobson Comments at 2-5.

The comparability of services and rates between urban and rural areas is compromised by a cap. Consumers who pay astronomical intraLATA toll charges and cannot access high-quality wireless service are denied the ability to achieve parity with their urban counterparts. Moreover, the lack of competition in the wireline world impedes wireline consumers from accessing nationwide one-rate plans now being offered by wireline carriers in urban areas.

The provision of specific and predictable support mechanisms is harmed. Wireless carriers become instantly subject to a cap, retroactive to 2006, destroying significant construction and upgrade plans and budgets, previously submitted to state regulatory commissions and the FCC. The regulatory promises made by the FCC between 1996 and 2006 are undercut even by the proposal for a cap, as carriers attempt to budget sometimes millions of dollars in new facilities under rules that may swing wildly. This amounts to poor stewardship of the universal service fund and a failure of policy at the agency, as rural consumers bear the consequences along with carriers.[174]

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[174] As Warren Lavey has explained, a regulator's choosing between short-term and long-term policy approaches can have significant consequences for telecommunications carriers and their customers:

> Although regulators can sometimes choose between short-term and long-term approaches, most telecommunications carriers must operate on the basis of assumptions about long-term industry conditions. Generally, telecommunications carriers make large investments in long-lived assets and face long cycles for product/service development and competitive positioning.
>
> Both regulated and unregulated businesses face uncertainties about factors such as market demand, technology changes, supply costs, and competitors' strategies. For businesses in regulated industries, uncertainty about future regulations can add to difficulties of companies in attracting capital and making investments in infrastructure, products, and services. Business plans are developed with long-term assumptions about a wide range of factors, some of which are heavily influenced by regulators. While regulators require or induce carriers to spend billions of dollars annually on networks and offerings, regulators also often preserve the flexibility of present and future commissioners to shape future regulations, which will determine in substantial part the carriers' returns on these investments. The business uncertainty for carriers resulting from such regulatory flexibility can impose costs on carriers in terms of less productive use of resources and lost opportunities. Costs can be imposed on consumers in terms of higher prices and lower service quality.

Warren G. Lavey, *Making and Keeping Regulatory Promises*, 55 FED. COMM. L.J. 1, 3 (2002). In the present case, of course, the proposed cap constitutes nothing more than an unwarranted short-term expedient that will result in direct and significant harm to consumers in rural America. The Commission would be better advised to complete its work on long-term universal service reform.

Access to advanced telecommunications services for schools, libraries, and rural health care facilities is compromised.[175] It scarcely bears mention that high-cost support delivers the infrastructure needed to provide these benefits in rural areas. If wireless carriers are denied the ability to construct facilities, funding for the schools, libraries and rural health care programs is useless in terms of a wireless carrier's ability to extend those benefits.

A prerequisite for imposing a CETC cap is a demonstration that the cap would not violate any of the universal service principles enacted by Congress. The proposed cap would not advance a single one of these principles and, remarkably, the Joint Board chose not to undertake any analysis showing how the cap would comply with the principles. Moreover, the Commission did not even request parties to comment on the issue of whether the cap would be permissible under the statute.

## VI. CONCLUSION

In deciding whether to adopt the recommendation made by the Joint Board, the Commission must consider what is in the record before it, and what is not.

Missing from the record are any facts or credible analysis supporting the Joint Board's claim that an emergency is posing a dire threat to the high-cost fund, and that imposition of a cap is the only means of averting this crisis and protecting consumer welfare. Any decision to take an action as severe as the one recommended by the Joint Board—the reduction of high-cost funds to wireless CETCs whose services and facilities are very much in demand in rural America, and are providing valuable benefits to rural consumers—must be built upon a solid foundation that leaves no doubt about the necessity and correctness of the action. That foundation simply is missing.

[175] Sprint Nextel Comments at 13-14.

On the other hand, the record demonstrates that imposition of the proposed CETC cap would have real and adverse consequences for consumers in rural America, that the cap violates the Commission's core principle of competitive neutrality and statutory mandates, that none of the rationales advanced by the Joint Board or its supporters erases or mitigates these violations, and that the factual circumstances of this case would not justify resort to any exercise of expansive agency discretion to impose a cap while avoiding coming to grips with the deficiencies in the Joint Board's case.

For these reasons, RCA and ARC respectfully renew their request that the Commission reject the Joint Board's recommendation.

Respectfully submitted,

**RURAL CELLULAR ASSOCIATION AND THE ALLIANCE OF RURAL CMRS CARRIERS**

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# APPENDIX A

## Commenter Names and Short-Form Citations

**[Only commenters for whom a short-form citation is used are shown in the chart.]**

| Commenter | Citation Form |
|---|---|
| Alaska Telephone Association | ATA |
| Alltel Corporation | Alltel |
| AT&T Inc. | AT&T |
| Blackfoot Telecommunications Group | Blackfoot |
| Centennial Communications Corp. | Centennial |
| CenturyTel, Inc. | CenturyTel |
| Chinook Wireless | Chinook |
| ComspanUSA | Comspan |
| Corr Wireless Communications, LLC | Corr |
| CTIA – The Wireless Association® | CTIA |
| DialToneServices, L.P. | DTS |
| Dobson Cellular Systems, Inc. | Dobson |
| Embarq Corporation | Embarq |
| ETS Telephone Company, Inc. | ETS |
| Frontier Communications | Frontier |
| Independent Telephone and Telecommunications Alliance | ITTA |
| Kansas Corporation Commission | Kansas CC |
| Midcontinent Communications | Midcontinent |
| Mid-Rivers Telephone Cooperative, Inc. | Mid-Rivers |
| Minnesota Independent Coalition | MIC |
| Montana Public Service Commission | Montana PSC |
| National Association of State Utility Consumer Advocates | NASUCA |
| National Exchange Carrier Association | NECA |
| National Telecommunications Cooperative Association | NTCA |
| Navajo Nation Telecommunications Regulatory Commission | Navajo Nation TRC |
| Nebraska Public Service Commission | Nebraska PSC |
| Nebraska Rural Independent Companies and South Dakota Telecommunications Association | Nebraska and South Dakota Companies |
| New Jersey Board of Public Utilities | New Jersey BPU |
| Rural Independent Competitive Alliance | RICA |
| Rural Iowa Independent Telephone Association | RIITA |
| Southern Communications Services, Inc. d/b/a SouthernLINC Wireless | SouthernLINC |

| Commenter | Citation Form |
|---|---|
| SureWest Communications | SureWest |
| Sprint Nextel Corporation | Sprint Nextel |
| TDS Telecommunications Co. | TDS |
| Telephone Association of Maine | TAM |
| Texas Statewide Telephone Cooperative, Inc. | TSTC |
| TracFone Wireless, Inc. | TracFone |
| United States Telecom Association | USTA |
| Verizon Communications Inc., Verizon, and Verizon Wireless | Verizon |
| Western Telecommunications Alliance | WTA |
| Windstream Communications, Inc. | Windstream |
| Wisconsin State Telecommunications Association | WSTA |